

No. 9748

United States
Circuit Court of Appeals

For the Ninth Circuit.

COUNTY OF ALAMEDA (a Body Corporate and
Politic, and a Political Subdivision of the State
of California),

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 240

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division

No. 9748

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Agreed Statements of Facts.....	126
Exhibits to Agreed Statement of Facts:	
1(a)—Complaint in United States vs. Crooks et al.....	144
1(b)—Map of Tidal Canal, 1882.....	146
1(c)—Opinion and Decision in United States vs. Crooks et al.....	149
1(d)—Findings of Fact and Conclu- sions of Law in United States vs. Crooks et al.....	156
1(e)—Decree in United States vs. Crooks et al.....	161
2—Map of Tidal Canal and Bridges as of 1909.....	166
3—Resolution of Board of Supervisors of Alameda County, dated De- cember 6, 1909.....	167
4—License, September 3, 1910.....	170
5—Resolution of Board of Supervisors of Alameda County, dated No- vember 10, 1913.....	172

Index	Page
Exhibits to Agreed Statement of Facts (cont.):	
6—Notice of September 28, 1939, from County of Alameda to United States	176
7—Notice of July 27, 1939, from Cen- tral Pacific Railway Company and Southern Pacific Company to United States.....	178
Answer of Central Pacific Railroad Company and Southern Pacific Company.....	56
Answer of County of Alameda.....	67
Exhibits to Answer:	
I—Agreement dated October 24, 1933 between United States of America and the County of Alameda.....	92
II—Agreement dated August 2, 1938 be- tween United States of America and the County of Alameda.....	96
III—Decision dated April 12, 1939 of the District Court of the Third Appellate District of the State of California in the cause entitled County of Alameda etc. vs. Horace P. Ross, etc.....	100
IV—Letter dated December 8, 1938 to W. E. Licking from Earl Warren	122
V—Letter dated January 3, 1939 to W. E. Licking from John R. Ober	123
VI—Letter dated January 3, 1939 to W. E. Licking from Ralph E. Hoyt	124

Index

Page

Appeal:

Bond on 279

Designation of Contents of Record on
(Appellee's) (District Court)..... 318

Designation of Contents of Record on
(Appellant's) (Circuit Court of Ap-
peals) 486

Designation of Contents of Record on
(Appellant's) (District Court)..... 305

Designation of Contents of Record on
(Appellant's Supplemental) (District
Court) 315

Notice of 277

Statement of Points on (Circuit Court of
Appeals) 490

Statement of Points on (District Court)..... 285

Attorneys of Record, Names and Addresses of 1

Bond on Appeal..... 279

Certificate of Clerk..... 319

Complaint 2

Exhibits to Complaint:

I—Decree in condemnation proceed-
ings in the Superior Court of the
County of Alameda, State of Cali-
fornia No. 3590. The United States
vs. Crooks, et al..... 19

Index	Page
Exhibits to Complaint (cont.):	
II—Agreement of March 7, 1901 between the United States, the Central Pacific Railway Company and the Southern Pacific Company.....	29
III—Resolution of the Board of Supervisors of the County of Alameda accepting Park Street, Fruitvale Avenue and High Street bridges.....	43
IV—License, September 3, 1910.....	46
V—Resolution of November 10, 1913 accepting license	48
VI—Notice of September 28, 1939.....	53
VII—Notice of July 27, 1939.....	54
Conclusions of Law.....	269
Conclusions of Law, Proposed.....	229
Conclusions of Law, Proposed Supplemental.....	241
Decree	272
Defendant Alameda County's Objections to Supplemental Conclusions	307
Defendant Alameda County's Proposed Amendments	230
Designation of Appellee of Contents of Record on Appeal (District Court).....	318
Designation of Appellant of Contents of Record on Appeal (Circuit Court of Appeals).....	486

Index	Page
Designation of Appellant of Contents of Record on Appeal (District Court).....	305
Designation of Appellant (Supplemental) (District Court)	315
Findings of Fact and Conclusions of Law.....	246
Findings of Fact and Conclusions of Law, Proposed	206
Findings of Fact and Conclusions of Law, Pro- posed Amendments and Additions to.....	230
Memorandum of Costs and Disbursements.....	276
Minute Order of March 21, 1940.....	125
Minute Order of March 22, 1940.....	197
Minute Order of March 26, 1940.....	200
Minute Order of April 3, 1940.....	201
Minute Order of April 10, 1940.....	202
Minute Order of June 27, 1940.....	204
Minute Order of July 9, 1940.....	204
Minute Order of September 14, 1940.....	243
Minute Order of September 21, 1940.....	245
Names and Addresses of Attorneys of Record	1
Notice of Appeal.....	277
Notice of April 11, 1940.....	203
Notice of July 10, 1940.....	205
Notice of September 16, 1940.....	244
Notice of October 22, 1940.....	275

Index	Page
Objections of Defendant to Supplemental Conclusions of Law.....	242
Statement of Points Relied on on Appeal (Circuit Court of Appeals).....	490
Statement of Points Relied on on Appeal (District Court)	285
Stipulation of Facts With Reference to Offer of Evidence by Defendant, County of Alameda, Subject to Objection of Plaintiff as to Materiality	180
Exhibits to Stipulation of Facts:	
1—Statement on motion for a new trial on behalf of defendant Alfred A. Cohen.	
Exhibits for plaintiff:	
A—Report dated February 1874	184
B—Letter dated August 31, 1875 to Hon. W. W. Belknap from S. F. Phillips	187
C—Letter dated August 31, 1875 to Walter Van Dyke from S. F. Phillips.....	189
C1—Letter to Hon. W. W. Belknap from A. A. Humphreys	189

Index

Page

Exhibits for plaintiff (cont.):

- C2—Letter dated August 28,
1875 to The Attorney Gen-
eral from Wm. T. Barnard 190

Witness for plaintiff:

Mendell, George H.

—direct 183

—cross 193

Stipulation of Facts With Reference to Offer
of Evidence by Defendant, County of Ala-
meda, Subject to Objection of Plaintiff as to
Materiality 198

Stipulation re Exhibits..... 510

Stipulation re Reporter's Transcript..... 283

Testimony 320

Exhibits for plaintiff:

8—Stipulation of facts with reference
to offer of evidence by plaintiff as
to materiality 351

9—Title sheet of maps of San Fran-
cisco Bay showing harbor lines
prepared by the San Francisco
Harbor Line Board, 1912..... 379

10—Map of Tidal Canal, Oakland
Harbor showing pierhead and
bulkhead lines 391

Index	Page
Exhibits for plaintiff (cont.):	
11—Map of Oakland Harbor showing harbor lines recommended by the Board of Engineer Officers October 11, 1888.....	402
12—Map of San Francisco Bay dated April 25, 1918 showing pierhead and bulkhead lines.....	404
Witnesses for defendants:	
Foulds, Edwin J.	
—direct	472
Pond, Henry S.	
—direct	458
Witnesses for the United States:	
Pond, Henry S.	
—direct	373
—cross	410
—redirect	448
—recross	451
—redirect	457

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In the Southern Division of the United States
District Court for the Northern District of
California

No. 21467L

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COUNTY OF ALAMEDA (a Body Corporate and
Politic, and a Political Subdivision of the State
of California), CENTRAL PACIFIC RAIL-
WAY COMPANY, and SOUTHERN PA-
CIFIC COMPANY,

Defendants.

COMPLAINT FOR DECLARATORY
JUDGMENT

Comes now the United States, by its attorney
Frank J. Hennessy, and for cause of action against
the above-named defendants, complains and alleges:

1. The County of Alameda was at all times herein mentioned, and now is a body corporate and politic, and a political subdivision of the State of California. The Central Pacific Railway Company, and the Southern Pacific Company are corporations, duly authorized and licensed to do business within the State of California, and are engaged in the business of operating railroad lines within and without said State and are the owners of, or claim some interest in, certain railway rights of way within the said County of Alameda in or over the tidal canal described hereafter. [1*]

2. This action arises under §24 (1) and §274 (d) of the Judicial Code as amended (48 Stat. 955; as amended August 30, 1935, c. 829, Sec. 405, 49 Stat. 1027.)

3. The City of Alameda and the City of Oakland are both situated upon the east shore of San Francisco Bay, a navigable body of water. Both said cities are located within Alameda County State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San Antonio Estuary, Oakland Estuary, Oakland Harbor, Inner Harbor and Tidal Canal and Alameda Estuary. Said body of water, or the estuary tidal canal is roughly seven miles in length, extending in a general east and west direction from San Leandro Bay, an arm of San Francisco Bay, on the east, to

*Page numbering appearing at foot of page of original certified Transcript of Record.

another point in San Francisco Bay proper at the end of the moles of the Southern Pacific Railroad Company and the Western Pacific Railroad Company on the west. Said Estuary constitutes what is commonly known as Oakland's inner harbor; the outer harbor extending in a northeasterly direction for about two miles from the entrance to the inner harbor. The westerly end of the Estuary, for a distance of about two miles, is an entrance channel, protected by stone retaining walls on either side. Said entrance channel varies from Seven Hundred and Fifty to Eight Hundred and Fifty feet in width. Immediately west of said entrance channel lies the main portion of the inner harbor, with docking facilities; the width of the channel here being Six Hundred feet, and the natural harbor varying from Six Hundred and Fifty feet at the narrowest points to about Three Thousand Five Hundred feet at the easterly end where the harbor widens to form what is known as Brooklyn Basin, which is used as a turning basin. [2]

The natural channel from the ends of the jetties at the mouth of the Estuary to Brooklyn Basin has been deepened by the United States by dredging. Easterly of Brooklyn Basin and forming a continuous part of the same body of water is a "Tidal Canal", connecting the inner harbor with San Leandro Bay. Said Tidal Canal was originally dredged by the United States as an aid to navigation in the inner harbor; the purpose of said canal being to increase the tidal flow to and from San Leandro

Bay to secure the benefit of its scouring action in keeping the channel free from deposit. Said Tidal Canal is nearly two miles in length and about Three Hundred feet in width and has been deepened from time to time since 1882 by the United States.

4. In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of \$100,000 was appropriated "for the improvement of Oakland harbor;" to be expended under the direction of the Secretary of War (18 Stat. 237, c. 457). Shortly prior to 1882 the United States instituted a condemnation proceeding in the District Court of Third Judicial District in and for the State of California (now the Superior Court of the State of California, in and for the County of Alameda) to acquire a right of way for the present Estuary tidal canal, said action being entitled *The United States, plaintiff, v. Crooks, County of Alameda, Central Pacific Railroad Company et al., defendants*, action No. 3590 in the Records of the County Clerk of the County of Alameda for the District Court of the Third Judicial District the State of California, in and for the County of Alameda. [3]

5. In said suit the County of Alameda and the railroad were named, among others, as defendants and the United States sought to condemn the right of the County and of the railroad in certain highways which crossed the proposed Estuary tidal canal at the places where the Fruitvale Avenue, High and Park Street bridges are now located, and

at Washington Avenue, where a bridge was then located.

The County of Alameda and the railroad company asked for no damages in said condemnation proceedings, and in the decree in said action it was provided, among other things:

“Defendants, the County of Alameda, The Central Pacific Railroad Company, Charles Heinicke and S. A. Smith, not having claimed damages, no damages are awarded to them.

“It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal.”

A full, true and correct copy of said decree is attached hereto marked Exhibit I.

6. In accordance with decree of condemnation, the United States constructed highway drawbridges at Park Street and High Street, and a combined highway and railroad drawbridge at Fruitvale Avenue over said tidal canal, and, as a part of the improvement of Oakland Harbor, the United States improved and deepened the channel of said canal, but the same was not opened to navigation. The Park Street bridge was completed in 1891, and the High Street and Fruitvale Avenue bridges were

completed in 1901. The bridges were constructed as drawbridges but were equipped only with hand-operated machinery. [4]

7. Prior to the institution of said condemnation proceedings the Central Pacific Railroad Company (predecessor of respondent Central Pacific Railway Company) was the owner of two lines of rail road extending across the lands sought to be condemned. One line of said railroad was on or adjoining Fruitvale Avenue, and the other line was on or adjoining Washington Avenue, across the site of the proposed tidal canal, in said Alameda County, and the said Central Pacific Railroad Company was the owner of rights of way in said two lines of railroad, and was a party defendant in said condemnation proceedings.

8. On March 7, 1901, an agreement in writing was entered into between the United States, Central Pacific Railway Company (said Central Pacific Railway Company having succeeded to the interest of said Central Pacific Railroad Company) and the Southern Pacific Company (lessee of Central Pacific Railway Company), under which agreement the Central Pacific Railway Company in consideration of \$50,000 agreed to abandon its line of railroad on or adjoining Washington Avenue, and to relieve the United States of any obligation to construct or maintain a drawbridge across said tidal canal at Washington Avenue. A full and true copy of said agreement is attached hereto marked Exhibit II.

9. On December 6, 1909, the Board of Supervisors of Alameda County adopted a resolution whereby the County agreed

“to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the water front of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks;” [5]

A full and true copy of said resolution is attached hereto marked Exhibit III.

10. In the Rivers and Harbors Act, approved June 25, 1910 (36 Stat. 630, c. 382), under the clause of appropriations therein for “Improving harbor at Oakland, California,” it is provided, *inter alia*:

“Provided Further: That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just

to the United States and to said local authorities. Provided Further: That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer."

In accordance with the discretion granted to the Secretary of War by said Act and in order to meet the terms of said transfer, and with the full knowledge and acquiescence of the railroad companies, the United States installed electrical operating machinery on each of said bridges; deepened and dredged said tidal canal and opened it to navigation; established harbor lines so that wharves and docks could be constructed; and did all other things required by said county as set forth in said Resolution of its Board of Supervisors of December 6, 1909 (Exhibit III). The total amount expended by the United States in this connection was \$513,000.

11. Thereafter, on September 5, 1910, the Secretary of War, acting within the discretion granted to him by Congress in the Rivers and Harbors Act of June 25, 1910, and with the knowledge of said railroad companies, issued a license whereby the said Secretary of War granted [6]

"unto the Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United

States in connection with the improvement of Oakdale Harbor, California.”

A full and true copy of said License is attached hereto marked Exhibit IV.

12. Thereafter, on November 10, 1913, the Board of Supervisors of Alameda County adopted a resolution accepting said License, in which, among other things, it was recited:

“Whereas, the United States had put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders’ houses and highway gates; and, also overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said license, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

“Be It Resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge, and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910. Said acceptance being effective from and after Monday, November 17, 1913.”

A full, true and correct copy of said Resolution is attached hereto marked Exhibit V.

13. Thereafter the said County of Alameda, with the full knowledge and acquiescence of said railroad companies, operated and kept said bridges in repair, and has replaced or rebuilt the bridge at Park Street, and is now engaged in constructing a new bridge at High Street. [7]

14. The Fruitvale Avenue Bridge is a combination vehicular, pedestrian and railroad swing span bridge, built upon a single concrete center pier, and has been operated and repaired since November 17, 1913, by the County of Alameda as hereinabove alleged. Said bridge is used by the Southern Pacific Company to operate both freight and interurban passenger trains over the same. This bridge connects residential and industrial sections of the City of Alameda with similar sections of the City of Oakland via Fruitvale Avenue, which Avenue is also a principal thoroughfare cutting through all the main traffic arteries between the Estuary tidal canal and the countryside. The Fruitvale Avenue bridge carries the only rail connection, both freight and interurban between the mainland and the City of Alameda, which is entirely surrounded by water.

The population of the County of Alameda has increased from 130,197 in 1900 to 474,883 in 1930, and at the present time approximately 135,000 vehicles (exclusive of railroad equipment) cross the Fruitvale Avenue bridge each thirty days.

15. Under the supposed authority of a decision, dated April 12, 1939, of the District Court of the Third Appellate District of the State of California, in a cause entitled County of Alameda (a body Corporate and Politic and a Political Subdivision of the State of California) v. Horace P. Ross, as Auditor of the County of Alameda, Civil No. 6184 (97 Cal. App. 166) said county notified the United States on September 28, 1939, that at midnight, December 31, 1939, said county will cease to operate said Fruitvale Avenue bridge. A full and true copy of said notice is attached hereto marked Exhibit VI. Said county has since agreed to operate said bridge until March 31, 1940, but, by such action, it has waived no rights it may have in the premises.

[8]

16. Neither the United States, nor any of its officers was a party to said action referred to in the preceding paragraph, nor were any of the pleadings in said action ever served upon the United States or any of its officers, and the United States never had an opportunity to appear in said action.

17. The offer of said County of Alameda to accept the burden of maintenance, operation, and repair of said Fruitvale Avenue Bridge set forth in the Resolution of its Board of Supervisors dated December 6, 1909, (Exhibit III); the acceptance of said offer by the expenditure of the sum of \$513,000 as alleged in paragraph 10, and the issuance of the

License by the Secretary of War on September 3, 1910, (Exhibit IV); and the ratification of the same by the Board of Supervisors of said county on November 10, 1913, (Exhibit V) and the long-continued compliance therewith by said county, constitute a valid and binding contract between the United States and the said county. That because of the threatened breach by said county of said contract the Central Pacific Railway Company, and the Southern Pacific Company served a notice upon the United States on July 27, 1939, that the United States "comply with the decree in the case of United States v. Crooks and others, * * * which decree was entered November 4, 1882 * * * and to cause this drawbridge (at Fruitvale Avenue) to be inspected, maintained and renewed * * *." A full and true copy of said notice is attached hereto marked Exhibit VII. The United States denies that any obligation now rests upon it to operate, maintain, repair or rebuild said bridge.

18. The District Court of Appeal, of the State of California, in and for the Third Appellate District, had no jurisdiction to set [9] aside the agreement between the said County of Alameda and the United States referred to in the preceding paragraph for the reason that the United States was not a party to the proceeding entitled Alameda County etc., v. Ross, referred to in paragraph 15 herein, and no process in said action was ever served upon the United States, and said court had no jurisdiction

to determine substantial rights of the United States in said action.

19. The District Court of Appeal, of the State of California, in and for the Third Appellate District, had no jurisdiction in the action entitled *Alameda County, etc., v. Ross*, to determine that the Secretary of War improperly or illegally exercised a discretion granted to him by Congress in the issuance of the said License dated September 3, 1910.

20. In consideration of the offer by said County of Alameda, as set forth by the Resolution of its Board of Supervisors, dated December 6, 1909 (Exhibit III), the United States expended the sum of \$513,000 in the installation of electrical operating machinery on each of said bridges; in deepening and dredging said tidal canal so that it could be opened to navigation; and in establishing harbor lines, and said county has had the benefit of said works since November 17, 1913, and is now estopped to question the validity of the agreement constituted by the offer of said county to accept the burden of maintenance, operation and repair of said Fruitvale Avenue Bridge (Exhibit III), the acceptance of said offer by the Secretary of War (Exhibit IV), and the ratification of the case by said county (Exhibit V).

21. The United States operated, maintained, and kept in repair the said bridge at Fruitvale Avenue from 1901, when said bridge was completed, until November 17, 1913, when said bridge was turned over to said county as hereinabove alleged. In con-

sideration of the offer [10] of the County of Alameda to operate, maintain and repair said bridges the United States also expended the sum of \$513,000 in installing electrical operating machinery on said bridges, and in deepening the channel of said tidal canal and establishing harbor lines. Said sum of \$513,000 was so expended by the United States between December 6, 1909, when the county made said offer (Exhibit III) and November 17, 1913, when said county accepted the license issued by the Secretary of War (Exhibit V), and the operation of said bridge and said sum constitute just compensation paid by the United States for the taking of the bridge sites, and any attempt on the part of said county, or the Central Pacific Railroad, or the Southern Pacific Company to compel the United States to pay any further sum, either to operate, repair, or replace the bridge at Fruitvale Avenue, or otherwise, is in violation of the agreement between said county and the United States that said county would operate, maintain and repair said bridge, and is without the jurisdiction of any court.

Wherefore, plaintiff prays:

1. That this court order specific performance by the county of Alameda of its agreement with the United States to operate, maintain or rebuild the bridge at Fruitvale Avenue in compliance with the agreement alleged in paragraph 17 herein, and that the United States be relieved of all liability in this regard.

2. That this court order, adjudge and decree that the contract between the County of Alameda and the United States, alleged in paragraph 17 herein is now, and has been since the 17th day of November, 1913, in full force and effect, and that under said contract the County of Alameda is obligated to repair, maintain, operate and replace the bridge at Fruitvale Avenue in accordance with the terms of the License issued by the Secretary of War on September 3, 1910, and accepted by the county on November 10, 1913. [11]

3. That this court order, adjudge and decree that any rights that the defendant railroad companies may have in the said Fruitvale Avenue Bridge are subject to the contract between the County of Alameda and the United States alleged in paragraph 17 herein, and that with the full knowledge, consent and acquiescence of said railroad companies a novation has taken place whereby the said county has been substituted for the United States in all things to be done or performed for the benefit of said railroad companies under said decree of condemnation mentioned in paragraph 4 herein.

4. That this court order, adjudge and decree that said County of Alameda is now estopped to deny or question the validity of the contract between said county and the United States alleged in paragraph 17 herein.

5. That this court order, adjudge and decree that the operation, repair and maintenance of said Fruit-

vale Avenue Bridge by the United States from the date of its completion in 1901, to November 17, 1913, and the expenditure of the sum of \$513,000 by the United States between December 6, 1909, and November 3, 1913, as alleged in paragraph 22 herein, constitutes just compensation paid by the United States for the condemnation and taking of said bridge sites, and that since November 17, 1913, there has been no obligation on the United States to expend any further sum to operate, maintain, repair, or replace said Fruitvale Avenue Bridge, either for the benefit of said county or for the benefit of said railroad companies, or either of them.

6. That pending the filing of an answer, and the hearing and final determination of this cause, this court issue an injunction pendente [13] lite restraining the said county and the railroad companies, their officers, agents and employees, from in any way varying, rescinding, revoking or nullifying the terms of the contract between the United States and said county alleged in paragraph 17 herein, or from failing or neglecting to repair, maintain, operate and replace said bridge at Fruitvale Avenue in accordance with the terms of the License issued by the Secretary of War on September 3, 1910, and accepted by the county on November 10, 1913, or
in the alternative

that this cause be advanced for a speedy hearing and determination as provided by Rule 57 of the Rules of Civil Procedure, so that a final judgment may be entered herein prior to March 31, 1940.

7. That the rights of all parties under the decree of 1882, and under the License issued by the Secretary of War on September 3, 1910, and accepted by the county on November 10, 1913, be defined and declared.

8. For such other and further relief as to the court may seem just and meet, and for costs.

FRANCIS M. SHEA,

Assistant Attorney General.

FRANK J. HENNESSY,

United States Attorney.

BRICE TOOLE,

Attorney Department of Justice.

[Endorsed]: Filed Jan. 17, 1940. Walter B. Mal-
ing, Clerk, By C. C. Evensen, Deputy Clerk. [14]

EXHIBIT I
DECREE IN
CONDEMNATION PROCEEDINGS [15]

In the Superior Court of the County of Alameda,
State of California. No. 3590
in the late 3rd District Court.

The United States

Plaintiff

v.

Susan Crooks, Executrix of the last will and Testament of M. Crooks, deceased, J. D. Farwell, Mrs. E. Farwell, R. Simson, H. Gibbons, Alameda County, A. A. Cohen, Central Pacific Railroad Company, P. Sather, J. M. Valdez and W. H. Glascock, G. G. Briggs, A. Ford, Charles Meinicke, T. A. Smith, Oakland Water Front Company, Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander and Marion Alexander, B. S. Brooks, A. E. Davis, H. W. Carpentier, O. Eldridge, John Caperton, J. G. Kellogg, G. H. Mendell, E. B. Mastick, Mrs. Frances E. Page, C. S. Stewart, G. W. Dent,

Defendants.

DECREE

This cause came on regularly for trial before the Court, a trial by jury having been expressly waived,

and it being stipulated that the same be tried by the Court sitting without a jury, the parties by their respective Attorneys being present in Court and consenting thereto:

It having been suggested to the Court that since the commencement of the action defendant M. Crooks had died, on motion Susan Crooks, Executrix of the last Will and Testament of Mathew Crooks, deceased, was substituted as defendant in place of said M. Crooks, deceased; also that defendant B. S. Alexander had died, and that his estate had been settled closed and distributed to his heirs Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander, and Marion Alexander, on motion said heirs were substituted as defendants in place of [16] said B. S. Alexander, deceased. It also appearing that defendant Charles Meinicke had since the commencement of the action succeeded to the interest of defendants M. Klinkofstrom, C. H. Stirling, H. Hansman, Charles Baum, Gottlieb Muecke, H. A. Gildemeister, Edmund Janssen, and Frederick Roeding, on motion said defendant Meinicke was substituted as defendant for said other last named defendants. And it further appearing that since the commencement of said action A. E. Davis had succeeded to the interest of defendants Caroline E. Chipman, E. Forge, J. C. Hayes, Annis Merrill, Mary A. Fitch, Thadeus S. Fitch, S. A. Chapin, C. C. Stevens, Wm. McAfee, James Spiers and Nathan Porter, on motion said Davis was substituted as defendant in place of said former defendants Chipman, Forge, Hayes, Merrill, Fitch—M. A. and T. S., —Chapin,

Stevens, McAfee, Spiers and Porter. And it further appearing that defendant H. W. Carpentier had since the commencement of said action succeeded to the interest of defendants John Stroufe, C. H. Bradley, Eli Corwin and H. M. Whitney, on motion said H. W. Carpentier was substituted as defendant for said defendants Sroufe, Bradley, Corwin and Whitney.

Whereupon a large number of witnesses were produced on the part of the plaintiff and the defendants examined, and documentary and written testimony introduced, and the testimony being closed, the cause was argued by the respective counsel and submitted to the court for consideration and decision; and after due deliberation thereon the Court delivered its findings and decision in writing which were filed herein on the 25th day of September 1882.

Wherefore by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff herein have judgment for the condemnation of the tract or [17] strip of land, in the Complaint and said findings set forth and herein after described, upon the payment to the defendants of the sums of money *respectively* found to be due them as damages assessed for the taking of said land, as set forth in said findings or that said plaintiff deposit in Court the aggregate sum so found due the defendants, to wit, the sum of Thirty nine thousand six hundred and ninety six (39696.00) Dollars for the said defendants respectively to be dis-

tributed to them according to said findings, towit:

To defendant Susan Crooks, executrix of the last Will and Testament of M. Crooks, deceased, and substituted as defendant in this proceeding in place of said M. Crooks, deceased, Two hundred and seventy four (274) Dollars:

To defendant Mrs. E. Farwell, Seven hundred and ninety five (795) Dollars:

To defendant R. Simson, Twelve hundred and forty two (1242) Dollars:

To defendant H. Gibbons Three thousand (3000) Dollars:

To defendant A. A. Cohen, Two thousand one hundred and seventy six (2176) Dollars:

To defendant P. Sather, Nine thousand four hundred and five (9405) Dollars:

To defendants J. M. Valdez and W. H. Glascock Fifteen thousand six hundred and sixty four (15664) dollars:

To defendant G. G. Briggs Two thousand five hundred and forty eight (2548) Dollars:

To defendant A. Ford Seven hundred and twelve (712) Dollars:

To defendants Oakland Water Front Company, Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander, Marion Alexander, B. S. Brooks, A. E. Davis, H. W. Carpentier, [18] O. Eldridge, John Caperton, J. G. Kellogg, G. H. Mendell, E. B. Mastick, Mrs. Frances E. Page and C. S. Stewart, Three thousand Eight hundred and Eighty (3880) Dollars:

Defendants the County of Alameda, the Central Pacific Railroad Company, Charles Meinicke and T. A. Smith—not having claimed damages, no damages are awarded to them.

It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all roads now used as public highways, crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the line of said canal.

The description and particular boundaries of said parcel or strip of land hereby ordered to be condemned for the public use and purpose of said tidal canal are as follows towit: [19]

* * * * *

In the Superior Court of the County of Alameda,
State of California
No. 3590 in late 3rd District Court

THE UNITED STATES,

Plaintiff,

vs.

M. CROOKS et al.,

Defendants.

This cause came on for trial on the 7th day of December, 1881. Before the trial, in consequence of the death or transfer of interest of some of the original defendants the representatives or succes-

sors in interest of such defendants respectively were thereupon, on motion and by consent of the respective parties, substituted in place of the said former defendants, deceased, or who had transferred their interest, to wit:

Susan Crooks, in place of M. Crooks, deceased; Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander and Marion Alexander in place of B. S. Alexander, deceased;

Defendant Charles Meinicke in place of M. Klinkofstrom, C. H. Strybing, H. Hansmann, Charles Baum, Gottlieb Muecke, H. A. Gildemeister, Edmund Janssen and Frederick Roeding, whose interests were transferred to said Meinicke;

A. E. Davis in place of Caroline E. Chipman, E. Forge, J. C. Hayes, Annis Merrill, Mary A. Fitch, Thadeus S. Fitch, S. A. Chapin, C. C. Stevenson, Nathan Porter, Wm. McAfee and James Spiers whose interests were transferred to said Davis Defendant H. W. Carpentier in place of John Sroufe, C. H. Bradley, Eli Corwin and H. M. Whitney, whose interests were transferred to defendant Carpentier;

And the said several parties by their Attorneys in [27] open Court, expressly waived a jury and consented and agreed to a trial by the Court sitting without a jury.

The trial thereupon proceeded before the Court sitting without a jury, and was continued from time to time, a large number of witnesses being produced and examined by their respective parties and docu-

mentary and written testimony introduced. And thereafter the case was argued by counsel for the respective parties, and on the 1st day of June 1882, was finally submitted to the Court for its decision.

And now having fully considered the case the Court finds and renders its decision as follows, to wit:

That the plaintiff, the United States of America, is duly authorized and empowered to improve Oakland Harbor in the said County of Alameda, State of California, in the interest of commerce, and said Harbor is a public navigable Harbor; and that to carry out the improvement of said Oakland Harbor, it is necessary to turn the water from San Leandro Bay or Estuary into and through San Antonio Estuary, which latter forms Oakland Harbor, for the purpose of removing the sediment from the same thereby increasing the depth of water in said Harbor. That to turn the tide water from San Leandro Bay to the head of Oakland Harbor it is necessary to cut a canal through the low neck of land lying between the two bays or Estuaries.

That for a canal to answer the purpose contemplated it will require the strip of land mentioned in the complaint and delineated on the map of survey, attached to said complaint and hereafter described, and that it is necessary to take said strip of land over and across which to make and excavate said canal.

That the use for which said strip of land is to be taken, to wit, said tidal canal, is a public use au-

thorized by law and by the government of the United States; that such taking [28] is necessary to such use.

That the location of said proposed canal, as hereinafter particularly described, has been made in the manner which will be most compatible with the greatest public good and will do the least private injury.

That the public use herein mentioned is a more necessary public use than that to which any portion of said strip of land has already been appropriated.

That the said strip of land to be taken is more particularly bounded and described as follows, to wit: [29]

* * * * *

That said property so sought to be condemned is of the value of \$39,696.00.

That said tract or strip of land sought to be condemned consists of different parcels owned and claimed by different parties, to wit: said defendants severally; and the value of each of said different parcels and each estate and interest therein separately assessed, are as follows to wit: [35]

* * * * *

That G. W. Dent a defendant herein filed an Answer setting up some claim to the Marsh land in controversy which claim to said and other Marsh lands has been adjudicated in this Court as to said title to said Marsh land and the claim of said Dent thereto, and the title and claim of said Dent thereto was by said Court decided to be invalid.

There are no damages to the property sought to be condemned by reason of its severance from the portion sought to be condemned and the construction and the improvement in the manner proposed by the plaintiff.

That it is necessary to construct and keep in repair good and sufficient bridges across said canal and all the public roads and railroads now leading from the town of Alameda across the line of said proposed canal and all roads now used as public highways whether so declared or not.

CONCLUSIONS OF LAW

From the foregoing facts the Court finds as a conclusion of law that the plaintiff is entitled to a judgment and decree condemning said tract or strip of land herein first described for the public use aforesaid upon paying the amount of damages herein assessed to the parties entitled thereto, respectively, or their attorneys, or by paying the aggregate sum assessed as damages into this Court for said respective parties.

That in the construction of said canal the plaintiff at its own cost, construct and keep in repair suitable bridges, across the same on all the Public highways and railroads now crossing the line of said canal and all roads now used as public highways whether so declared or not and It Is So Ordered.

N. HAMILTON,
Judge. [54]

In the Superior Court of the County of Alameda,
State of California

THE UNITED STATES,

Plaintiff,

vs.

M. CROOKS et *als*,

Defendants.

I, Andrew Ryder, County Clerk of the County of Alameda, State of California, ex-officio Clerk of the Superior Court, in and for said County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book 3 Dept. 1 of said Court, at page 302. And I further certify that the foregoing papers hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the seal of said Superior Court this 4th day of Nov., A. D. 1882.

State of California,
County of Alameda—ss.

I, John P. Cook, County Clerk of the County of Alameda, and ex-officio Clerk of the Superior Court thereof which said Superior Court is the successor to the Third District Court of the Third Judicial District of the State of California, do hereby certify that the foregoing are true and correct copies of all the papers constituting the Judgment Roll in the cause of The United States, Plaintiff vs. M.

Crooks et al, Defendants, which cause is No. 3590 of the Third District Court of the County of Alameda, State of California, as said papers are of file and record in the office of the said Superior Court.

I do further certify that I have made diligent search for certain maps introduced and filed as exhibits in said cause, but have been unable to find them or any of them and believe that said maps are not at present on file in this office.

In Witness Whereof I have hereunto set my name and affixed the official seal of the Superior Court aforesaid at my office in the City of Oakland, County of Alameda, State of California, this 21st day of November, A. D. 1905.

JOHN P. COOK,

County Clerk and ex-officio
Clerk of the Superior Court
of the County of Alameda,
State of California. [55]

EXHIBIT II

Agreement of March 7, 1901. [56]

A.

This Agreement, made and entered into this Seventh (7th) day of March A. D. 1901, between the United States of America, the Central Pacific Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and the Southern Pacific Company, a cor-

poration duly organized and existing under and by virtue of the laws of the State of Kentucky.

Witnesseth: That whereas, the United States of America, as plaintiff, did on the fourth day of March 1876, commence proceedings in the Third District Court of the State of California, in the County of Alameda, against the Central Pacific Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and other defendants, for the condemnation of certain lands and rights owned and claimed by said defendants and required by said plaintiff for the construction of a Tidal Canal, authorized by certain Acts of Congress making appropriations for the improvement of Oakland Harbor.

And Whereas, on the fourth day of November 1882, in the Superior Court of the County of Alameda, State of California, jurisdiction having been conferred thereon, a certain decree was filed in said cause condemning the lands and rights of said defendants, and especially condemning the lands and rights of the said Central Pacific railroad Company for the uses and purposes for which the same were sought, and which is more especially set out in the complaint therein and in said decree.

And Whereas, in said decree it was determined and adjudged as a condition to be kept and performed by the United States of America, that in the construction of said canal, the said United States should, at its own expense, construct and keep in repair for the said Central Pacific Railroad Company, certain railroad bridges across the same,

along the line of the present railroad crossing the said proposed canal that is to say, one along the line of said railroad on or adjoining Fruitvale Avenue, [57] and one along the line of said railroad on or adjoining Washington Avenue, which said last mentioned line is shown colored red on the annexed map and made part hereof.

And Whereas, the said Central Pacific Railway Company is the successor in interest of the said Central Pacific Railroad Company, and as such has succeeded to all the rights and privileges in and by virtue of said decree of Court,

And Whereas, The Southern Pacific Company, as the lessee, has or claims some interest in the decree aforesaid,

And Whereas, the abandonment of one of said bridges, to wit, the one on the line of said railroad on or adjoining Washington Avenue would be in the interest of commerce and navigation, and would relieve the said United States of great expense in constructing and keeping the same in repair.

Now Therefore, in consideration of the premises, and the sum of Fifty thousand (\$50,000) dollars paid by the United States to the Central Pacific Railway Company, the receipt whereof is hereby acknowledged, the Central Pacific Railway Company and the Southern Pacific Company do hereby release, absolve and discharge, now and forever, both in law and in equity the said United States from the performance of the obligation and condition to construct the bridge along the said line of

railroad on or near Washington Avenue, and the United States is hereby released, absolved and discharged, now and forever, both in law and in equity, from the performance of the obligation and condition to construct the said proposed bridge along the said line of railroad on or near Washington Avenue, and accepts this agreement and payment as a full performance of said decree in reference to said last named bridge.

In Witness Whereof, the parties hereto, the United States by W. H. Heuer, Lieutenant Colonel, Corps of Engineers, U. S. A., duly authorized by law and the Secretary of War, the Central Pacific Railway Company by its [58] President and Secretary, duly authorized by resolution of its Board of Directors passed on the Thirty-first day of January 1901, and the Southern Pacific Company by its President and Secretary, duly authorized by resolution of its Board of Directors passed on the 7th day of March 1901, have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in presence of

G. KNIGHT WHITE.

W. H. HEUER,

[Seal]

Lieutenant Colonel, Corps of
Engineers, U. S. A.

CENTRAL PACIFIC

RAILWAY COMPANY

[Seal]

By ISAAC S. REQUA,

President,

J. L. WILLCUTT,

Secretary,

SOUTHERN PACIFIC
COMPANY

[Seal] By CHAS. M. HAYS,
President,
I. E. GATES,
Secretary.

(Copies of resolutions and acknowledgments attached.) [59]

State of New York,
City and County of New York—ss.

On the 7th day of March in the year 1901, before me, Wm. Shillaber, a Commissioner of Deeds for the State of California in the State of New York, duly commissioned and sworn, personally appeared Isaac E. Gates, known to me to be the Secretary of the Southern Pacific Company, the corporation that executed the within instrument, and acknowledged to me that he executed the same as said Secretary.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the date and year last above written.

[Seal] WILLIAM SHILLABER,
Commissioner of Deeds for
the State of California in New
York.

State of California,
City and County of San Francisco—ss.

On this 14th day of March, A. D. 1901, before me E. B. Ryan, a notary public in and for the City and County of San Francisco, duly commissioned and sworn, personally appeared Chas. M. Hays, known to me to be the President of the Southern Pacific Company, one of the corporations described in and who executed the within and annexed instrument, and acknowledged to me that said corporation executed the same.

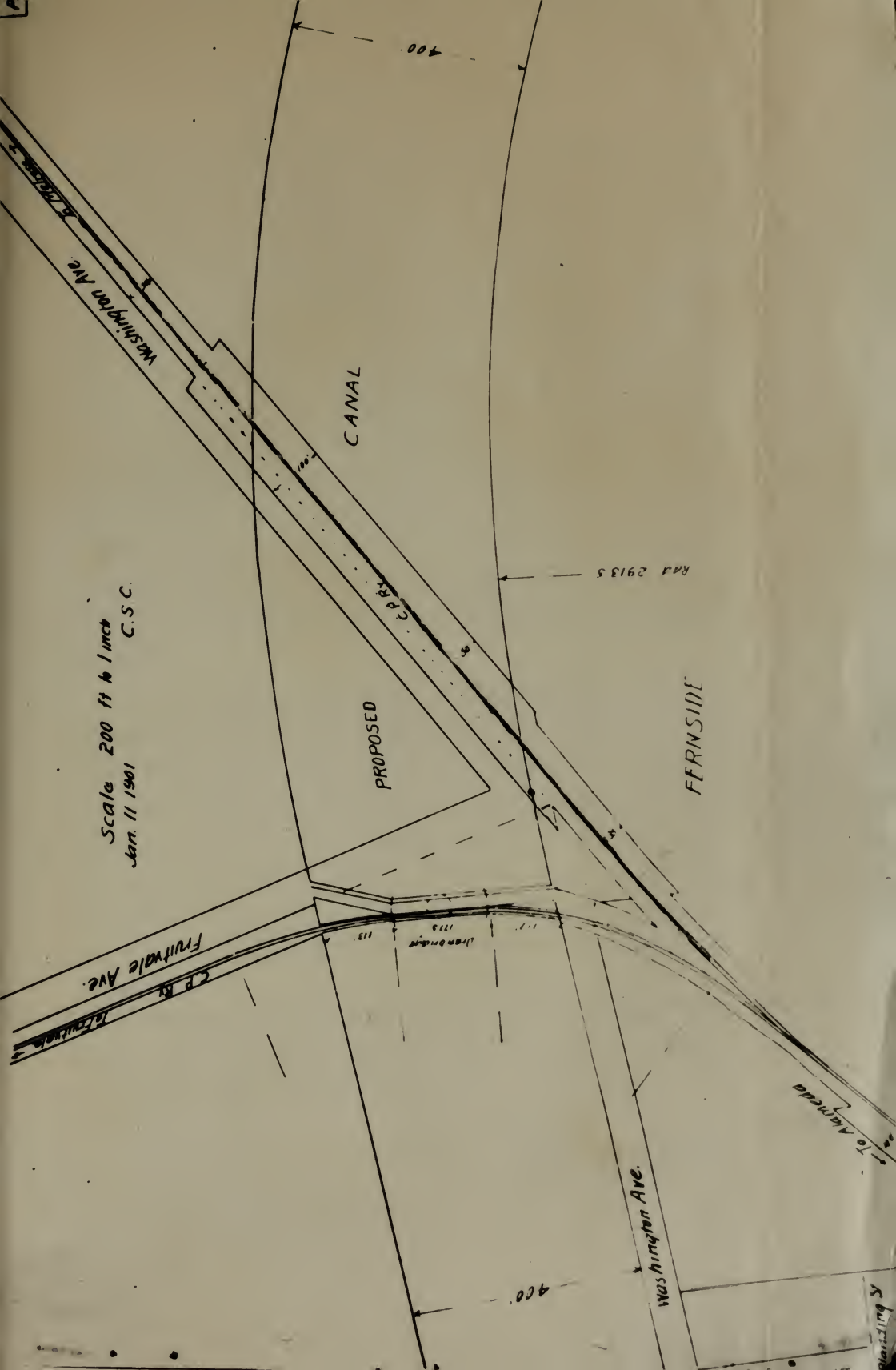
In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal]

E. B. RYAN,

Notary Public, In and for the
City and County of San
Francisco, State of Cali-
fornia. [60]

Scale 200 ft to 1 inch
Jan. 11 1901
C.S.C.



Resolved, That Charles M. Hays, President, and I. E. Gates, Secretary, of this Company, be and they are hereby authorized to execute on its behalf, and under its corporate seal, the agreement, draft of which has been submitted to this Board, between the United States of America, the Central Pacific Railway Company and the Southern Pacific Company, releasing the United States from the obligation and condition to construct the bridge across the tidal canal along the line of railroad of the Central Pacific Railway Company on or near Washington Avenue, in the City of Oakland, California, imposed by a decree of the Superior Court of the County of Alameda, State of California, November 4, 1882.

I, I. E. Gates, Secretary of the Southern Pacific Company, do hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Directors of said Company at a meeting thereof held in the office of the Company on the 7th day of March, 1901, as appears by the record of the proceedings of the Board of Directors of said Company in my custody as said Secretary.

In Witness Whereof, I hereunto set my hand and affix the corporate seal of said Southern Pacific Company this 7th day of March, A. D. 1901.

I. E. GATES,

Secretary. [62]

Central Pacific Railway Company

Copy of Resolution Adopted January 31st, 1901

Adopting agreement between the United States of America, the Central Pacific Railway Company, and the Southern Pacific Company, covering the relinquishment of right of way for a bridge across the tidal canal, Alameda County, California.

Resolved that the President and Secretary of this Company be and they are hereby authorized, empowered and directed to execute as the act and deed of the Company and under its Corporate Seal, an agreement with the United States in substantially the words and figures following, to-wit: [63]

This Agreement, made and entered into thisday of.....A. D. 1901, between the United States of America The Central Pacific Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and the Southern Pacific Company, a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky.

Witnesseth: That whereas, the United States of America, as plaintiff, did on the fourth day of March 1876, commence proceedings in the Third District Court of the State of California, in the County of Alameda, against the Central Pacific Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and other defendants, for the condemnation of certain lands and rights owned and

claimed by said defendants and required by said plaintiff for the construction of a Tidal Canal, authorized by certain Acts of Congress making appropriations for the improvement of Oakland Harbor.

And Whereas, on the fourth day of November 1882, in the Superior Court of the County of Alameda, State of California, jurisdiction having been conferred thereon, a certain decree was filed in said cause condemning the lands and rights of said defendants, and especially condemning the lands and rights of the said Central Pacific railroad Company for the uses and purposes for which the same were sought, and which is more especially set out in the complaint therein and in said decree.

And Whereas, in said decree it was determined and adjudged as a condition to be kept and performed by the United States of America, that in the construction of said canal, the said United States should, at its own expense, construct and keep in repair for the said Central Pacific Railroad Company, certain railroad bridges across the same, along the line of the present railroad crossing the said proposed canal that is to say, one along the line of said railroad on or adjoining Fruitvale Avenue, [64] and one along the line of said railroad on or adjoining Washington Avenue, which said last mentioned line is shown colored red on the annexed map and made part hereof.

And Whereas, the said Central Pacific Railway Company is the successor in interest of the said Central Pacific Railroad Company, and as such has

succeeded to all the rights and privileges in and by virtue of said decree of Court,

And Whereas, The Southern Pacific Company, as the lessee, has or claims some interest in the decree aforesaid,

And Whereas, the abandonment of one of said bridges, to wit, the one on the line of said railroad on or adjoining Washington Avenue would be in the interest of commerce and navigation, and would relieve the said United States of great expense in constructing and keeping the same in repair.

Now Therefore, in consideration of the premises, and the sum of Fifty thousand (\$50,000) dollars paid by the United States to the Central Pacific Railway Company, the receipt whereof is hereby acknowledged, the Central Pacific Railway Company and the Southern Pacific Company do hereby release, absolve and discharge, now and forever, both in law and in equity the said United States from the performance of the obligation and condition to construct the bridge along the said line of railroad on or near Washington Avenue, and the United States is hereby released, absolved and discharged, now and forever, both in law and in equity, from the performance of the obligation and condition to construct the said proposed bridge along the said line of railroad on or near Washington Avenue, and accepts this agreement and payment as a full performance of said decree in reference to said last named bridge.

In Witness Whereof, the parties hereto, the United States by F. H. Heuer, Lieutenant Colonel, Corps of Engineers, U. S. A., duly authorized by law and the Secretary of War, the Central Pacific Railway Company by its [65] President and Secretary, duly authorized by resolution of its Board of Directors passed on the.....day of.....1901, and the Southern Pacific Company by its President and Secretary, duly authorized by resolution of its Board of Directors passed on the.....day of.....1901, have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in presence of

.....
.....
Lieutenant Colonel, Corps of
Engineers, U. S. A.

CENTRAL PACIFIC
RAILWAY COMPANY

By
President

.....
Secretary

SOUTHERN PACIFIC
COMPANY

By
President

.....
Secretary [66]

I, J. L. Willcutt, Secretary of the Central Pacific Railway Company, a corporation duly organized under the laws of the State of Utah, hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Directors of said Company, at a meeting of said Board held at the office of the Company in the City and County of San Francisco, State of California, on the 31st day of January, 1901, as the same appears on the Record of Proceedings of said Board in my custody as such Secretary.

Witness my hand and the corporate seal of said Company at San Francisco, California, the 31st day of January 1901.

[Seal]

J. L. WILLCUTT,

Secretary, Central Pacific
Railway Company. [67]

EXHIBIT III

RESOLUTION OF BOARD OF SUPERVISORS
OF ALAMEDA COUNTY

December 6, 1909. [68]

Copy of 637. (Alameda Co. Oakland Tidal Cn. Fruitvale Ave.)—22/1

RESOLUTION OF THE BOARD OF SUPER-
VISORS OF THE COUNTY OF ALAMEDA,
STATE OF CALIFORNIA, ACCEPTING
PARK STREET, FRUITVALE AVENUE
AND HIGH STREET BRIDGES.

Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

Whereas, that portion of said canal between said bridges has never been open to navigation; and

Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges hereinbefore referred to, to wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and,

Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed [69] to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and

repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant Colonel John Biddle, and to the City Clerk of the City of Alameda.

Passed and adopted by the following vote:

Ayes: Supervisors—Bridge, Foss, Mullins and Ch.

Honrner—4.

Noes: Supervisors—None.

Absent: Supervisors—Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,

County Clerk and Ex-officio
Clerk of the Board of Super-
visors of Alameda County,
Cal.

By H. M. WILSON,

Deputy Clerk. [70]

EXHIBIT IV
LICENSE [71]

Whereas, By the Act of Congress approved June 25, 1910, entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes" (Public—No. 264), and under the clause of appropriation therein for "Improving harbor at Oakland, California", it is provided, *inter alia*, as follows:

"Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer";

Now, Therefore, Under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants

unto the Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This License is granted subject to the following conditions and provisions:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting

it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

Witness my hand this day of September, 1910.

[Illegible]

Assistant and Chief Clerk, For the Secretary of War, in his absence. [72]

EXHIBIT V.

RESOLUTION OF NOVEMBER 10, 1913,
ACCEPTING LICENSE. [73]

49
City of 77152/26

RESOLUTION OF THE BOARD OF SUPERVISORS
OF THE COUNTY OF ALAMEDA.

Introduced by Supervisor _____

At meeting held Aug. 10 1913.

WHEREAS, this Board of Supervisors, by resolution heretofore adopted, agreed to accept certain draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

WHEREAS, subsequent to the adoption of said resolution, and on the 3rd day of September, 1910, the Secretary of War, in accordance with the provisions of an Act of Congress, approved June 25, 1910, entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes" (public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the said three bridges built by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and revisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more lines or corporations shall desire to use the bridges, or any of them, each shall pay its proportional share of the cost and its share of maintenance of the track or tracks jointly used.

...for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated,

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and

WHEREAS, the United States has put all three bridges in

condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

BE IT RESOLVED that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit: the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said conditions being effective from and after the date, to-wit: 17th, 1913.

Adopted by the following vote:

AYES: Supervisors Bridge, Park, Kelly, Bunch, & Chairman Smith
NAYS: Supervisors None
ABSENT: Supervisors None

I, John P. Cook, County Clerk, and ex officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State of California, on Monday, September, 10, A. D., 1913,

JOHN P. COOK,
County Clerk and ex-Officio Clerk
of the Board of Supervisors of
Alameda County, State of California

By. *H. M. Wilson*
Deputy Clerk.

EXHIBIT VI.

NOTICE OF SEPTEMBER 28, 1939. [77]

Copy of 6371 (Alameda Co.—Oakland Tidal Cn.
—Fruitvale Ave.)—23

County of Alameda

September 28, 1939.

R. C. Hunter

Major, C. E.

District Engineer

In re: The Fruitvale Avenue Bridge and the
decision in County of Alameda v. Ross,
97 Cal. App. D 166, petition for hearing
denied by the Supreme Court of the State
of California.

Dear Sir:

As stated in our letter addressed to J. A. Dorst,
Lt. Col., C. E. on June 30, 1939, the above decision
holds that the license agreement under which the
County is operating the Fruitvale Avenue Bridge
is void.

The Board of Supervisors of the County of Ala-
meda has felt that the United States Government
should be given a reasonable length of time within
which to meet the situation created by this deci-
sion. In view of the above mentioned decision, the
County cannot continue to operate the Fruitvale
Avenue Bridge indefinitely. The Board of Super-
visors has accordingly directed me to notify you

that at midnight, December 31, 1939, the County of Alameda will cease to operate said bridge.

Respectfully yours,

G. E. WADE,

County Clerk and Ex-Officio
Clerk of the Board of Supervisors of the County of Alameda, State of California.

By J. C. HOLLAND,
Deputy. [78]

EXHIBIT VII.

NOTICE OF JULY 27, 1939. [79]

Copy of 6371 (Alameda Co.—Oakland Tidal Cn.—Fruitvale Ave.)—18/1

Southern Pacific Company
65 Market St., San Francisco

File: G-4179-2
July 27, 1939.

District Engineer,
U. S. War Department,
Custom House,
San Francisco, Calif.

Dear Sir:

The attention of your office has several times been called to the situation of the so-called Fruitvale

Avenue Drawbridge between Oakland and Alameda. I call your attention particularly to a formal notice under date of November 26, 1937, signed on behalf of the Central Pacific Railway Company and Southern Pacific Company delivered to your office on December 17, 1937.

We have recently been informed by representatives of the County of Alameda that the County will no longer maintain or operate the drawbridge referred to. This decision on the part of the County appears to be due in large part at least, to a decision of the District Court of Appeal, Third District of California, under date of April 12, 1939, in proceeding No. 6184—County of Alameda vs. Ross, to the effect that the license or agreement which purported to place this drawbridge under the jurisdiction of the County was void, at least so far as the County was concerned, and that the County could not lawfully expend moneys on the bridge.

The railroad portion of this drawbridge is an important artery of commerce, forming the only all-rail connection to the City of Alameda and it is essential that proper steps be taken to renew the bridge within a reasonable time. The Central Pacific Railway Company, successor to Central Pacific Railroad Company, and Southern Pacific Company, its lessee, therefore renew their demand that the U. S. Government comply with the decree in the case of the United States vs. Crooks, and others, being case No. 3590, which decree was entered November 4, 1882 and is on file in the office of the

County Clerk of Alameda County, Calif. Said decree provides, among other things:

“* * * that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same * * * and also suitable railroad bridges on the present railroad tracks crossing the line of said canal.” [80]

You are therefore again called upon to cause this drawbridge to be inspected, maintained and renewed so that the public service of said bridge will not be interrupted.

CENTRAL PACIFIC RAILWAY
COMPANY

SOUTHERN PACIFIC COMPANY

By E. J. FOULDS

Their Attorney [81]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, CENTRAL PACIFIC RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY.

Come now defendants, Central Pacific Railway Company and Southern Pacific Company, and as and for their Answer to the complaint in the above-entitled proceeding, admit, deny and allege as follows:

I.

Admit the allegations of paragraphs One (1), Two (2), Three (3) and Four (4) of said complaint. [82]

II.

Admit the allegations of paragraph Five (5) of said complaint, and with respect thereto allege that the railroad therein referred to as a party defendant in said condemnation suit of *United States v. Crooks, et al*, was the Central Pacific Railroad Company, a corporation, which corporation in the year 1899 transferred and conveyed all of its rights, properties and franchises to Central Pacific Railway Company, one of the defendants herein. By virtue of said transfer and conveyance, defendant, Central Pacific Railway Company, ever since has been and is the successor to and owner of all of the rights, properties and franchises so transferred and conveyed, including all of the rights accorded to said Central Pacific Railroad Company in and by the decree in the said condemnation suit and the successor of said Central Pacific Railroad Company in the ownership of the railroad and railroad facilities therein referred to, which railroad and railroad facilities are in possession of Southern Pacific Company, as lessee, and operated by it as a part of its railroad system for the transportation of persons and property, both in interstate and intrastate commerce, as a common carrier for hire.

III.

Admit the allegations of paragraphs Six (6), Seven (7), Eight (8), Nine (9), and Ten (10) of said complaint, except that with reference to the allegations of said paragraphs Nine (9) and Ten (10), these defendants allege that they were for many years, and until recently, without knowledge of the resolution alleged to have been adopted by the Board of Supervisors of Alameda County on December 6, 1909, or of the terms and conditions of any license issued by or agreement made by the Secretary of War relating to the control of said Fruitvale Avenue Bridge; nor have these defendants, or either of them, ever had, up to the time of filing of the complaint herein, any knowledge of any relinquishment, denial or repudiation of [83] the obligations of the United States with respect to said Bridge; and, so far as known to these defendants, there was no such relinquishment, denial or repudiation on the part of the United States up to the time of filing the complaint herein. Furthermore, neither of these defendants has, nor have they both, nor have their predecessors, or any of them, at any time, directly or indirectly, released the United States from any obligations with respect to said Bridge, or accepted any obligation of the County of Alameda with respect to said bridge, in lieu of the obligations of the United States or otherwise.

IV.

Admit the allegations of paragraphs Eleven (11) and Twelve (12) of said complaint, except that

these defendants allege that they had no knowledge of the license issued under date of September 3, 1910 by the Secretary of War, at the time it was issued, or for many years thereafter, and did not at any time take any action or change their position in any way by reason thereof, nor have they, directly or indirectly, released the United States from its obligations in the premises, or accepted any obligation of the County of Alameda in the place and stead of the obligations of the United States in the matter, or otherwise.

V.

Admit the allegations of paragraphs Thirteen (13), Fourteen (14), Fifteen (15) and Sixteen (16) of said complaint; and in this behalf allege that neither of these defendants was a party to the case of County of Alameda v. Ross, therein referred to, nor were any of the pleadings in said action ever served upon them, or either of them; and that by reason thereof neither of these defendants is directly or indirectly bound by the decision, decree or judgment in said case.

VI.

Admit the allegations of paragraphs Seventeen (17), Eighteen (18), Nineteen (19), Twenty (20) and Twenty-one (21) of said complaint, except that with reference to the allegations of [84] said paragraph Twenty-one (21), these defendants deny that the moneys expended by the United States in the maintenance, operation, repair and improvement of

the Fruitvale Avenue drawbridge, therein referred to, constituted just or any compensation for the lands and rights of these defendants, and their predecessors, taken by the United States, in the case of United States v. Crooks, et al, referred to in said complaint; that the United States has not paid to these defendants, or either of them, or their predecessors, just or any compensation for the taking of their rights at the site of said Fruitvale Avenue drawbridge; and that as between the plaintiff, United States, and these defendants, their respective rights and obligations have been adjudicated and decreed in said case of United States v. Crooks, and have not subsequently been altered, amended or modified in any way, in so far as said Fruitvale Avenue drawbridge is concerned.

And in this behalf, these defendants further allege that they are not directly or indirectly, nor is either of them, a party to the alleged agreement between the United States and the County of Alameda, set forth in said complaint, and hence by their insistence upon the performance by the United States of its obligations under the decree of court in said case of United States v. Crooks, either directly or indirectly, or through its successors, assigns or licensees, do not and cannot violate any agreement to which these defendants, or their predecessors, or any of them, were or are a party or parties.

VII.

And as for their affirmative defense, these defendants allege that for many years prior to the construction of said tidal canal or San Antonio Estuary in the location of the present Fruitvale Avenue drawbridge, Central Pacific Railroad Company, predecessor of defendant, Central Pacific Railway Company, was the owner of a strip of land fifty (50) feet wide, lying [85] equally on each side of the track of said Central Pacific Railroad Company, extending over what was then dry land between Oakland and Alameda, said strip of land being adjacent to the road or street then and still known as Fruitvale Avenue, said strip of land having been acquired by said Central Pacific Railroad Company by grant deed from Wm. H. Glasscock and others, under date of October 5, 1876, recorded October 20, 1876, in Liber 133 of Deeds, page 257, of the County Records of Alameda County, California, and constituted a fee owned right-of-way for said railroad line. Said railroad line between Oakland and Alameda was opened for common carrier railroad operation in December 1876, and ever since has been continuously operated by said Central Pacific Railroad Company, or its successor, Central Pacific Railway Company, and by Southern Pacific Company, as lessee, and by Interurban Electric Railway Company, under trackage rights.

That by virtue of the condemnation proceedings in the case of *United States v. Crooks, et al*, referred to in said complaint, and the decree of con-

demnation of said proceeding, the United States acquired, by eminent domain, the right to extend said tidal canal across said railroad right-of-way adjacent to Fruitvale Avenue and the railroad tracks and facilities thereon; that no compensation was awarded to these defendants, or their predecessors, or any of them, for such taking, but in lieu thereof, the said court, by its judgment and decree, imposed the obligation upon the United States to construct and keep in repair suitable bridges for the public highways and railroad tracks crossing the lines of said canal including the said track at or near Fruitvale Avenue; and no other compensation or consideration has been paid to these defendants or their predecessors, or any of them, for said taking; and, so far as known to these defendants, all moneys which have been expended by the United States and by the County of Alameda, its licensee, upon or with respect to said bridge at Fruitvale Avenue, have been so [86] expended in conformity with, and pursuant to, the obligations upon the United States under said decree in the case of *United States v. Crooks*, and not otherwise.

That the said Fruitvale Avenue drawbridge was thereafter constructed by the United States in accordance with said judgment and decree of court in the case of *United States v. Crooks, et al*, and a railroad track placed thereon in substitution for the railroad track connecting Oakland and Alameda, formerly over the right-of-way hereinabove

described. The operation of said railroad line has ever since continued over said bridge in lieu of the former tracks laid upon said railroad right-of-way in said location; said railroad line over said bridge now constitutes the only railroad track connection between the City of Alameda and the main land and constitutes part of an important artery of commerce, over which many thousand people and many carloads of freight are transported daily in regular railroad operation; that it is imperative that the track connection afforded by said drawbridge remain unimpaired and that the said bridge be maintained in good condition and repair, so as to support said track connection, in the interest of the safety and convenience of the traveling and shipping public using the same, and in the interest of these defendants.

These defendants allege that the duty to maintain said bridge or a suitable bridge at Fruitvale Avenue for the purposes aforesaid is imposed upon the United States by the decree of court in the case of *United States v. Crooks*, referred to in said complaint; that the United States has never been released by these defendants, or either of them, or by their predecessors, from the obligation so imposed upon it with reference to such bridge; and these defendants are entitled to require the performance by the United States, either directly or through its successors, assigns or licensees, including the County of Alameda, as such licensee, of the obligations imposed upon the United States by said decree of [87]

court in the case of United States v. Crooks; and that it is in the public interest, and in the interest of these defendants that this court reiterate and declare that the United States, its successors, assigns and licensees, including the County of Alameda as such licensee, are bound by said decree of court, and require them to conform therewith.

These defendants further allege that the public interest, as well as their interest, and rights in the premises, require that said Fruitvale Avenue drawbridge be kept open for traffic as it now is; that any disruption of rail traffic over said bridge would cause great and irreparable injury and damage to the public and to these defendants; and that in the event of any threatened interruption of the use of this bridge, this court should issue an appropriate injunctive order to prevent any such interruption.

Wherefore, defendants pray that this Court by its judgment and decree:

1. Declare that the decree of condemnation in the case of United States v. Crooks, et al, imposes a valid and subsisting obligation upon plaintiff, United States of America, either alone or jointly with the County of Alameda, as licensee of the United States, in favor of these defendants and their successors and assigns, with respect to the maintenance of a suitable bridge or bridges to carry the railroad line of these defendants, their successors and assigns, across the San Antonio Estuary where it intersects Fruitvale Avenue in the County of Alameda, State of California; and that the plain-

tiff, United States of America, either alone or jointly with its licensee, the County of Alameda, are under a valid, subsisting and continuing obligation to provide, maintain, operate and renew such bridge or bridges so long as the same may be necessary to carry the tracks of these defendants [88] across said Estuary in said location; and that these defendants are entitled to enforce such obligation.

2. Require plaintiff, United States of America, either alone or jointly with its licensee, the County of Alameda, to maintain, keep in repair, renew, and operate such bridge, and to take all steps and proceedings necessary or proper to fulfill said obligation.

3. Award these defendants their costs herein, and such other and further relief as may be just, meet and proper in the premises.

Dated: February 5th, 1940.

E. J. FOULDS

Attorney for Defendants, Southern Pacific Company and Central Pacific Railway Company.

[89]

State of California,
City and County of San Francisco—ss.

Jay D. Bacon, being duly sworn, deposes and says:

That he is Assistant Secretary of Central Pacific Railway Company and Assistant Secretary of Southern Pacific Company defendants in the foregoing action; that he has read said Answer and

knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

JAY D. BACON

Subscribed and sworn to before me this 5th day of February, 1940.

(Notarial Seal)

FRANK HARVEY

Notary Public In and for the City and County of
San Francisco, State of California.

Admission of Service

Service of the within answer is hereby admitted this 5 day of February, 1940.

RALPH E. HOYT,

District Attorney for Alameda County

By J. F. COOKLEY,

Chief Ass't

FRANK J. HENNESSY

U. S. Attorney

By W. E. LICKING

Ass't U. S. Atty

[Endorsed]: Filed Feb. 6, 1940. [90]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR
DECLARATORY JUDGMENT.

Comes now the County of Alameda, a body corporate and politic, and a political subdivision of the State of California, one of the defendants above named, by its Attorney, Ralph E. Hoyt, District Attorney in and for said County, and answering the complaint for declaratory judgment on file herein admits, denies and alleges as follows:

I

Admits the allegations contained in Paragraphs 1, 2 and 3 hereof.

II

Admits the allegations contained in Paragraph 4 hereof except that this defendant denies that the Rivers and Harbors Act (18 Stat. 237, C. 457) was enacted in the year 1873 and in this connection alleges that the said Act was enacted in the year 1874. [92]

III

In reference to Paragraph 5 thereof, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations that the United States sought to condemn the right of the County in a highway which crossed the proposed Estuary Tidal Canal at Washington Avenue or that a bridge was then located at said Washington Avenue. Admits all of the remaining allegations contained in Paragraph 5 thereof.

III-A

Admits the allegations contained in Paragraph 6 of the complaint.

IV

With reference to Paragraph 7 of the complaint, defendant admits that the Central Pacific Railroad Company was a party defendant in said condemnation action. With reference to the other allegations in said Paragraph, defendant is without knowledge or information sufficient to form a belief as to the truth of said allegations.

IV-A

With reference to the allegations contained in Paragraph 8 of the complaint, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

V

With reference to Paragraph 9 thereof, defendant admits that on December 6, 1909, the Board of Supervisors of Alameda County adopted a resolution, of which Exhibit III attached to the Complaint is a full and true copy, but denies that the County of Alameda agreed to assume any or all costs of future repairs, operation and replacement of said bridges.

VI

With reference to Paragraph 10 thereof, defendant admits that in the Rivers and Harbors Act, approved June 25, 1910 (36 Stat. 630, c. 382), under

the clause of appropriations therein for "Improving harbor at Oakland, California," it is provided, *inter alia*:

"Provided Further: That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities. Provided Further: That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer." [93]

Admits that the United States installed electrical operating machinery on the Fruitvale Avenue, Park Street and High Street Bridges; deepened and dredged said tidal canal and opened it to navigation; and established harbor lines so that wharves and docks could be constructed as alleged therein.

Denies generally and specifically, each and every, all and singular, the remaining allegations contained therein, save and except the allegations that the total amount expended by the United States in this connection was five hundred thirteen thousand dollars (\$513,000.00), and in this respect alleges

that defendant is without knowledge or information sufficient to form a belief as to this allegation.

VII.

With reference to Paragraph 11 thereof, defendant admits that on September 5, 1910, the Secretary of War issued an alleged license to the Board of Supervisors of Alameda County, concerning the operation and control of the said three bridges, which alleged license was revocable at will, and that Exhibit IV attached to said Complaint is a full, true and correct copy of said alleged license.

VIII.

With reference to Paragraph 12, defendant admits that on November 10, 1913, the Board of Supervisors of Alameda County adopted a resolution concerning the operation and control of said three bridges and that Exhibit V attached to said Complaint is a full, true and correct copy of said resolution.

Denies that Alameda County accepted said license, and in this connection alleges that the action of the Board of Supervisors in adopting the said resolution purporting to accept said license was beyond its authority, ineffective and void. [94]

IX.

With reference to Paragraph 13 of the Complaint, admits that thereafter the said County of Alameda, operated and kept said bridges in repair, and has replaced or rebuilt the bridge at Park

Street; but denies that said County is now engaged in constructing a new bridge at High Street, and in this connection alleges that said County has completed the construction of a new bridge at High Street; and further denies that either said Park Street Bridge or said High Street Bridge was constructed by the County of Alameda pursuant to said License Agreement; but in this connection alleges that the Park Street Bridge was constructed pursuant to the provisions of that certain Agreement duly made and entered into by and between the United States of America and the County of Alameda on the 28th day of November, 1933, a full and true copy of which Agreement is attached hereto, marked Exhibit I and made a part hereof; and further alleges that the High Street Bridge was constructed pursuant to the provisions of that certain Agreement duly made and entered into by and between the United States of America and the County of Alameda on the 2nd day of August, 1938, a full and true copy of which Agreement is attached hereto, marked Exhibit II and made a part hereof; and in this connection further alleges that in the construction of the Park Street Bridge the United States furnished approximately 30% of the cost thereof and the County has accordingly received the sum of Two Hundred Thirty-four Thousand Eight Hundred Nineteen Dollars and Seventy Cents (\$234,819.70) from the United States in payment of the total cost of the construction of the Park Street Bridge and further alleges that in

the construction of the High Street Bridge the United States has undertaken to furnish approximately 45% of the cost thereof, and the County has accordingly received the sum of Two Hundred Fifty-six Thousand Two [95] Hundred Dollars (\$256,200.00) from the United States in payment of a part of said portion of the total cost of the construction of the High Street Bridge, and the County has requisitioned the balance of said portion due from the United States in the sum of Seventy-three Thousand Two Hundred Dollars (\$73,200.00).

X.

Admits the allegations contained in Paragraph 14 thereof.

XI.

Denies the allegations contained in Paragraph 15 thereof that under the supposed authority of a decision, dated April 12, 1939, of the District Court of the Third Appellate District of the State of California, in a cause entitled County of Alameda (a body Corporate and Politic and a Political Subdivision of the State of California) v. Horace P. Ross, as Auditor of the County of Alameda, Civil No. 6184 (97 Cal. App. 166), said county notified the United States on September 28, 1939, that at midnight, December 31, 1939, said County would cease to operate said Fruitvale Avenue Bridge, but in this connection alleges that on June 1, 1939, the Supreme Court of the State of California denied an application by Petitioner for hearing by said

Supreme Court of a decision dated April 12, 1939, of the District Court of the Third Appellate District of the State of California in an action entitled "County of Alameda, a Body Corporate and Politic and a Political Subdivision of the State of California, Petitioner, v. Horace P. Ross, as Auditor of the County of Alameda, State of California, Respondent," 32 Cal. App. (2nd) 135, 89 Pac. (2nd) 460, a full and true copy of which latter decision as set forth in said California Appellate Reports is attached hereto, marked Exhibit III and made a part hereof, in which decision the alleged license agreement between the United [96] States and the County of Alameda under which the County was operating the Fruitvale Avenue Bridge was held to be void, and admits that, in view of this decision and said order of the Supreme Court of the State of California, said County notified the United States on September 28, 1939, that at midnight, December 31, 1939, the County would cease to operate said Fruitvale Avenue Bridge.

Admits the allegations contained in Paragraph 15 thereof that a full and true copy of said notice is attached to Plaintiff's complaint and marked Exhibit VI.

Denies the allegations contained in Paragraph 15 thereof that said County has since agreed to operate said bridge until March 31, 1940, but in this connection alleges that the Board of Supervisors of said County has extended the time during which the County will operate the Fruitvale Avenue

Bridge for a period of ninety (90) days from December 31, 1939.

Admits the allegations contained in Paragraph 15 thereof that by continuing to operate said bridge for a period of ninety (90) days from December 31, 1939, the County of Alameda has waived no rights it may have in the premises.

XII.

Admits the allegations contained in Paragraph 16 thereof that neither the United States nor any of its officers was a party to said action referred to in the preceding paragraph hereof, but denies that none of the pleadings in said action were ever served upon the United States or any of its officers, and denies that the United States never had an opportunity to appear in said action, and in this connection alleges that on December 8, 1938, prior to the hearing of said action, the attorney for Petitioner in said action deposited in the United States mail, postage prepaid, addressed to the office of the United States District Attorney, [97] Post Office Building, San Francisco, California, copies of the following in said action: (1) Petition for Writ of Mandate filed in the Supreme Court of the State of California; (2) Petitioner's Points and Authorities on application for Writ of Mandate; (3) Alternative Writ of Mandate; and (4) Order of the Supreme Court transferring action to the District Court of Appeal of the Third Appellate District, and a full and true copy of the letter of transmittal is attached hereto,

marked Exhibit IV and made a part hereof; that on January 3, 1939, prior to the hearing of said action, the attorney for Respondent in said Action deposited in the United States mail, postage prepaid, addressed to said office of said United States Attorney, a copy of Respondent's Answer to Petition for Writ of Mandate and a copy of his Points and Authorities in support thereof, in said action, together with a letter of transmittal advising said office of said United States Attorney as to when and where the matter would be submitted on briefs, and a full and true copy of the letter of transmittal is attached hereto, marked Exhibit V and made a part hereof; and that on January 3, 1939, prior to the hearing of said action, the attorney for Petitioner in said action deposited in the United States mail, postage prepaid, addressed to said office of said United States Attorney, a copy of the Agreed Statement of Facts, a copy of Petitioner's Reply to Respondent's Answer, a copy of Points and Authorities thereof and a copy of a stipulation to submit the matter on briefs, in said action, together with a letter of transmittal advising said office of said United States Attorney as to when and where the matter would be submitted on briefs, and a full and true copy of the letter of transmittal is attached hereto, marked Exhibit VI, and made a part hereof.

XIII.

With reference to the allegations contained in Paragraph [98] 17 of the Complaint that the Cen-

tral Pacific Railway Company and the Southern Pacific Company served a notice upon the United States on July 27, 1939 that the United States "comply with the decree in the case of United States v. Crooks and others, . . . and that a full and true copy of said notice is attached to plaintiff's complaint marked Exhibit VII, the defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of said allegations.

The defendant denies each and every, all and singular the remaining allegations in said Paragraph 17 of the complaint.

XIV.

Denies each and every, all and singular the allegations contained in Paragraph 18 thereof and in this connection alleges that the District Court of Appeal of the State of California, in and for the Third Appellate District, had the jurisdiction and power in said decision of County of Alameda, etc., vs. Ross, etc., referred to in Paragraph IX herein, (Exhibit III), to find and determine that said alleged license agreement which the United States and the Board of Supervisors of Alameda County purported to enter into, was void under both the Constitution and the Statutes of the State of California, as well as void under other designated and well established principles of law, and in this connection further alleges that the Supreme Court of the State of California, on June 1, 1939, denied pe-

itioner's application to have the cause heard in said Supreme Court after said judgment in said District Court of Appeal.

XV.

Denies each and every, all and singular the allegations contained in Paragraph 19 hereof, and in this connection alleges that the District Court of Appeal of the State of Cali- [99] fornia, in and for the Third Appellate District, in said action entitled County of Alameda, etc., vs. Ross, etc., did not determine that the Secretary of War improperly or illegally exercised a discretion granted to him by Congress in the issuance of said License dated September 3, 1910.

XVI.

With reference to the allegations contained in Paragraph 20 of the Complaint the defendant denies generally each and every, all and singular, the allegations contained therein and in this connection the defendant specifically denies that the resolution of the Board of Supervisors of Alameda County dated December 6, 1909 constituted an offer by the County of Alameda, and defendant further denies that the United States in consideration of the said alleged offer expended the sum of Five Hundred Thirteen Thousand Dollars (\$513,000.00) or any other sum in the installation of electrical operating machinery on each of said bridges and/or deepened and dredged said tidal canal so that it could be

opened to navigation and/or established harbor lines and defendant alleges that in doing each and all of said things the United States did nothing more than it was already bound and obligated to do. Defendant further denies that said county has had the benefit of said work since November 17, 1913 or any other date and/or that said County is now estopped to question the validity of the alleged agreement alleged to have been constituted by the alleged offer of Alameda County to accept the burden of maintenance, operation and repair of said Fruitvale Avenue Bridge, the alleged acceptance of said alleged offer by the Secretary of War and the alleged ratification of the same by said County; defendant further denies that the County of Alameda ratified the alleged acceptance of the said Secretary of War and defendant further denies that there is [100] now or ever has been any agreement on the part of the County of Alameda to accept the burden of maintenance, operation and repair of said Fruitvale Avenue Bridge.

XVII.

Answering Paragraph 21 of the Complaint defendant admits the allegation that the United States operated, maintained and kept in repair the bridge at Fruitvale Avenue from 1901 until November 17, 1913. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph 21 of said complaint that the sum of Five Hundred

Thirteen Thousand Dollars (\$513,000.00) or any other sum was expended by the United States in installing electrical operating machinery on said bridge and/or in deepening the channel of said tidal canal and/or establishing harbor lines between December 6, 1909 and November 17, 1913. Defendant specifically denies that the County of Alameda on December 6th, 1909, or at any other time made an offer to operate, maintain and repair said bridges and defendant further denies that said County on November 17, 1913 or at any other time accepted the alleged license, allegedly issued by the Secretary of War; and defendant denies that there now is or at any time has been an agreement between the County of Alameda and the United States that said County will operate, maintain and repair said bridge; and defendant generally and specifically denies each and every all and singular the other allegations contained in said paragraph of said complaint.

XVIII.

And that for affirmative defenses the defendant County of Alameda alleges that:

The City of Oakland and the City of Alameda are situated upon the east shore of San Francisco Bay, a navigable [101] body of water; that both cities are located within the County of Alameda, State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San Antonio Estuary, Oakland Estuary,

Oakland Harbor, Inner Harbor, Tidal Canal and/or Alameda Estuary; that that portion of said body of water extending from San Francisco Bay to the eastern end of Brooklyn Basin was, and at all times herein and in said complaint mentioned was, a navigable body of water; that said body of water at all times herein and in the complaint mentioned was and is an arm of San Francisco Bay; that, pursuant to the powers and duties of the government of the United States "to regulate commerce with foreign nations and among the several States" (U. S. Const. Art. I, Sec. 8) and various laws of the United States from time to time enacted by Congress pertaining to the regulation of navigable waters within the United States and to the improvement of rivers and harbors of the United States and more particularly pursuant to the laws of the United States by Congress enacted with reference to the improvement of Oakland Harbor and said estuary and the regulation of commerce and traffic thereon, plaintiff assumed control of said body of water in connection with the regulation of commerce and traffic thereon and upon San Francisco Bay and undertook to improve said estuary; that, because of constantly accumulating sediment upon the bottom of said estuary between its mouth on the west and its eastern end in said Brooklyn Basin, the United States deemed it necessary to dig and dredge a tidal canal from said eastern end of Brooklyn Basin to said San Leandro Bay as described in the complaint; that this work was done

as an aid to navigation and for the purpose of increasing the tidal flow in said estuary between San Leandro Bay and San Francisco Bay [102] and by the scouring effect or action of said tidal flow keep the channel of the said estuary free from deposit or sediment.

That, in connection with the said project of constructing or digging said tidal canal, the United States brought in the District Court of the Third Judicial District in and for the State of California, now the Superior Court of the State of California in and for the County of Alameda, a condemnation action entitled "United States, plaintiff, vs. Crooks, County of Alameda, Central Pacific Railroad Company, et al., defendants, Action No. 3590"; that said action was brought for the purpose of condemning and obtaining the land upon which to construct or dig said tidal canal between the said Brooklyn Basin and San Leandro Bay; that, prior to and at the time said action of United States vs. Crooks, et al. was begun, the County of Alameda owned and maintained public roads upon the land sought by plaintiff in said condemnation action; that the defendant, Central Pacific Railroad Company, predecessors, and/or assignors and/or lessors of the defendants, Central Pacific Railway Company and Southern Pacific Company, owned and maintained rights of way and tracks in connection with the operation of trains across said strip of land sought by plaintiff in said action.

That by virtue of the condemnation proceedings in the case of United States v. Crooks, et al, referred to in said complaint, and the decree of condemnation of said proceeding, the United States acquired, by eminent domain, the right to extend said tidal canal across said public roads and highways owned and operated by the said County of Alameda and across said railroad right of way adjacent to Fruitvale Avenue and the railroad tracks and facilities thereon; that no compensation was awarded to these defendants, or their predecessors, or any of them, for such taking, [103] but in lieu thereof, the said court, by its judgment and decree, imposed the obligation upon the United States to construct and keep in repair suitable bridges for the public highways and railroad tracks crossing the lines of said canal including the said track at or near Fruitvale Avenue; and no other compensation or consideration has been paid to this defendant for said taking; and, so far as known to this defendant, all moneys which have been expended by the United States upon or with respect to said Bridge at Fruitvale Avenue, have been so expended in conformity with, and pursuant to, the obligations imposed upon the United States under said decree in the case of United States v. Crooks, and the laws of the United States.

The County of Alameda asked for no damages in said condemnation suit and in the judgment in said action the Court provided as follows:

“Defendants, the County of Alameda, The Central Pacific Railroad Company, Charles Meinicke and S. A. Smith, not having claimed damages, no damages are awarded to them.

“It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the line of said canal.”

That, pursuant to said decree in said condemnation action and pursuant to the powers and duties of the United States government to regulate commerce with foreign nations and among the several states and to regulate commerce upon navigable waters of the United States and by virtue of the laws of the United States from time to time enacted by Congress and more particularly by virtue of the laws of the United States enacted by Congress with reference to the control and regulation of commerce upon the navigable waters of Oakland Harbor and said estuary and the [104] improvement thereof, the United States did dig, dredge and construct said tidal canal and did build and construct the Park Street Bridge, the High Street Bridge and the Fruitvale Avenue Bridge across said tidal canal; and in building and constructing the said bridges the United States constructed them as drawbridges

and, particularly with reference to the Fruitvale Avenue Bridge, installed in connection with the drawbridge portion of said bridge hand operating machinery; that for many years thereafter the United States maintained and operated said Fruitvale Avenue Bridge; that, subsequent to the said construction of said Fruitvale Avenue Bridge and said installation of hand operating machinery, the population of the cities of Oakland and Alameda increased, and commerce and business, both interstate and with foreign countries, as well as intrastate, increased in said cities; that traffic connected with interstate and foreign commerce increased upon the waters described in Paragraph 3 of the complaint, and traffic upon the bridges spanning said body of water likewise increased; as a result of said increase in commerce and traffic the said bridges, and particularly the hand operating machinery on said Fruitvale Avenue Bridge, became obsolete, unsuitable and inadequate.

Because of said increased traffic conditions and commerce upon the said bridges and upon the said estuary, and in order to comply with the duties imposed upon plaintiff by the laws of the United States in connection with the regulation, control and aid of navigation and because of the provisions of the decree in the case of *United States v. Crooks, et al.*, requiring plaintiff at its own expense to construct and keep in repair suitable bridges across said estuary, it became necessary to install electrical

operating equipment and machinery upon the said Fruitvale Avenue Bridge. [105]

That some time prior to November, 1913, said electrical operating machinery was installed upon said Fruitvale Avenue Bridge by plaintiff.

That at some time subsequent to the condemnation by plaintiff of the said strip of land described by the decree in the case of *United States v. Crooks, et al.*, and before November, 1913, plaintiff dredged and deepened the said tidal canal, opened it for navigation and established harbor lines thereon.

That in dredging and deepening the said tidal canal, opening to navigation, establishing harbor lines, and installing electrical operating machinery upon the Park Street, High Street and Fruitvale Avenue Bridges, plaintiff did nothing more than what it was already bound and obligated to do under the laws of the United States and the decree in the said case of *United States v. Crooks, et al.*, hereinabove mentioned.

That on December 6, 1909, the Board of Supervisors of Alameda County adopted a resolution concerning the future repair, operation and replacement of said bridges, a copy of which resolution is marked Exhibit III and attached to the complaint in this action.

That on June 25, 1910, the Congress of the United States passed a law with reference to the improvement of Oakland Harbor, to-wit, Rivers and Harbors Act approved June 25, 1910, (36 U. S. Statutes 630, C. 382) which provided inter alia that the three

bridges, to-wit, Park Street, High Street and Fruitvale Avenue, might be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities, and that subsequent to said enactment the Secretary of War issued "unto the [106] Board of Supervisors of Alameda County a license, revocable at will by the Secretary of War" to assume control of the three bridges subject to certain conditions and provisions. That a full, true and correct copy of said license is attached to the complaint marked Exhibit IV.

That on November 10, 1913, the Board of Supervisors of Alameda County adopted a resolution concerning said license, a copy of which said resolution is attached to the complaint in this action and marked Exhibit V.

That subsequent to November, 1913, the Board of Supervisors of Alameda County operated, maintained and kept in repair the said Fruitvale Avenue Bridge.

That the action of the said Board of Supervisors of Alameda County in adopting the resolution of December 6, 1909, was beyond and without the scope of authority and powers of said Board of Supervisors and did not bind the defendant County of Alameda to operate, maintain, repair or rebuild the said Fruitvale Avenue Bridge.

That the said license hereinabove mentioned did not bind or obligate the defendant County of Alameda to operate, maintain or repair or rebuild the said Fruitvale Avenue Bridge.

That the resolution of November 10, 1913, adopted by the Board of Supervisors of Alameda County hereinabove mentioned was beyond and without the scope of authority and powers of said Board of Supervisors and did not bind the defendant County of Alameda.

That at all times herein and in the complaint in this action mentioned, the said resolutions of December 6, 1909, and November 10, 1913, were ineffective, illegal, void and not binding upon the defendant County of Alameda. [107]

That said action of said Board of Supervisors adopting said resolution was not the action of the defendant County of Alameda and neither said resolution or either of them constituted an offer by the defendant County of Alameda to assume all costs of future repair, operation and replacement of said bridges.

That neither the said resolution of the Board of Supervisors of December 6, 1909, nor the said license hereinabove referred to, nor the said resolution of the Board of Supervisors of November 10, 1913, constituted an offer and/or an acceptance of a contract to or by either the United States or the County of Alameda and that neither individually nor together did said resolution or action of the Board of Supervisors and/or of the Secretary of

War constitute a valid or a binding contract between the Board of Supervisors of Alameda County and the United States or between the defendant County of Alameda and the United States.

That the operation, maintenance, repair and/or rebuilding of the said Fruitvale Avenue Bridge by the Board of Supervisors was and is illegal and beyond, without and contrary to the authority and powers of said Board of Supervisors.

That said operation, maintenance, repair and/or rebuilding of said bridge in no way bound the said Board of Supervisors or the defendant County of Alameda to continue the operation, maintenance, repair of said Fruitvale Avenue Bridge or to rebuild said bridge.

That the Board of Supervisors of the County of Alameda does not and did not have the power, either expressed or implied, to legally make expenditures for the operation, maintenance, repair and/or rebuilding of said bridge or to obligate the said County of Alameda to operate, maintain, repair and/or rebuild the same. [108]

That any agreement to operate, maintain, repair and/or rebuild said bridge by the County of Alameda is and was prohibited by Section 31 of Article IV of the Constitution of the State of California prohibiting a county from making a gift of any public money or thing of value to any individual, municipal or other corporation.

That any agreement by the County of Alameda to operate, maintain, repair and/or rebuild the

said Fruitvale Avenue Bridge is and was prohibited by Section 18 of Article XI of the Constitution of the State of California, prohibiting the County from incurring any indebtedness or liability in any manner or for any purpose exceeding in any one year the income and revenue provided for such year for said county. [109]

XIX.

That the Complaint fails to state a claim or cause of action against defendant, County of Alameda, upon which the relief prayed for can be granted.

Wherefore, defendant, County of Alameda, prays:

1. That this court deny each and every, all and singular the things, requested in the prayer of plaintiff's Complaint, save and except that contained in paragraph 7 of the said prayer and in this connection defendant, County of Alameda prays that all of the rights, obligations and liabilities of each and all of the parties to this action in the premises, and more particularly with reference to the control, operation, maintenance, repair and rebuilding of said Fruitvale Avenue bridge be defined, declared and adjudicated in this action.

2. That this court order, adjudge and decree that the plaintiff herein is bound and obligated to operate, maintain, repair and when necessary to rebuild or replace said Fruitvale Avenue bridge.

3. That this court order, direct and enjoin plaintiff to assume control, operation, maintenance and repair of said Fruitvale Avenue bridge on or before March 31, 1940. [110]

COUNTERCLAIM

In the event of any doubt or question whether under Section 274d of the United States Judicial Code or of other laws of the United States this Court has power to declare rights and other legal relations of any interested party other than the party petitioning or filing the complaint, defendant County of Alameda by and through Ralph E. Hoyt, District Attorney in and for the County of Alameda, hereby affirms, alleges, claims and avers by way of counterclaim in the above entitled action as follows, to-wit:

I

Adopts, reaffirms, realleges, restates and by reference incorporates each and every, all and singular, the paragraphs, allegations, statements and contents of the Answer hereinabove set forth.

Wherefore, defendant and counterclaimant prays:

1. That this Court define, declare and adjudicate all rights, obligations and liabilities of each and all of the parties to this action in the premises and that more particularly with reference to the control, operation, maintenance, repair and rebuilding of said Fruitvale Avenue Bridge, said rights, obligations and liabilities of each and all of the parties to this action be defined, declared and adjudicated.

2. That this Court order, adjudge and decree that the United States is bound and obligated to operate, maintain, repair and, when necessary, to rebuild or replace said Fruitvale Avenue Bridge.

3. That this Court order, direct and enjoin the United States to assume control, operation, main-

tenance and repair of said Fruitvale Avenue Bridge on or before the 1st day of March, 1940.

4. That this Court order, adjudge and decree that there never [111] was any valid, binding contract or agreement between the United States and defendant County of Alameda or between the United States and the Board of Supervisors of the County of Alameda, whereby the defendant County of Alameda or the Board of Supervisors of the County of Alameda was bound to operate, maintain, repair and/or rebuild the said Fruitvale Avenue Bridge.

5. That this Court order, adjudge and decree that the defendant County of Alameda and/or the Board of Supervisors of the County of Alameda be now and forever relieved, released and absolved of any obligation, liability, duty or responsibility in connection with the control, operation, maintenance, repair and/or rebuilding of the said Fruitvale Avenue Bridge.

Dated: February 7, 1940.

RALPH E. HOYT,

District Attorney of the County of Alameda, State of California,

By J. F. COAKLEY,

Chief Assistant District Attorney of the County of Alameda, State of California.

Attorney for Defendant
County of Alameda.

EXHIBIT I.

Copy of Agreement Made and Entered Into By
and Between the United States of America and
the County of Alameda, Dated the 24th Day
of October, 1933, Concerning the Construction
of the Park Street Bridge. [113]

Agreement

This Agreement, made and entered into by and between the United States of America, acting by and through the Secretary of War, duly authorized, hereinafter designated as the first party, and the County of Alameda, State of California, acting by and through its Board of Supervisors, who are duly authorized, hereinafter designated as the second party, Witnesseth:

Whereas, by a decree of the District Court of the Third District of California (now known as the Superior Court of the State of California in and for the County of Alameda) rendered under date of September 30, 1882, the right of way for the Oakland Harbor Tidal Canal, California, a navigable waterway of the United States, was condemned, it was, inter alia, ordered, adjudged and decreed that in the construction of said Canal the plaintiff, the United States and first party herein, at its own expense construct and keep in repair suitable bridges across the Canal on all the roads then used as public highways crossing the line of said Canal, and also suitable railroad bridges on the then existing railroad tracts crossing the line of said Canal;

And, Whereas, thereafter, and in compliance with the above mentioned decree the first party con-

structed and maintained three bridges over and across said Canal;

And, Whereas, by Act of Congress approved June 25, 1910 (36 Stat. 630, 661), which included an appropriation for the further improvement of the harbor at Oakland, California, it was provided, *inter alia*, that the three bridges theretofore built by the United States in connection with that improvement may be turned over to the local authorities, to be maintained and operated by [114] them upon such terms as to transfer and control as in the discretion of the Secretary of War may be deemed equitable and just to the United States and to said local authorities;

And Whereas, by Act approved January 21, 1927 (44 Stat. 1010, 1014), Congress adopted a modification of the existing project for the improvement of Oakland Harbor, California, in accordance with and subject to the conditions set forth in House Document No. 407, 69th Congress, 1st Session, said conditions providing, *inter alia*, that local interests should alter or replace the bridges over the Tidal Canal, when, in the opinion of the Secretary of War, such alteration or replacement was deemed necessary in the interest of navigation and thereafter operate and maintain them;

And Whereas, under dates of April 11 and 13, 1931, the Acting Chief of Engineers and The Assistant Secretary of War, respectively, approved plans and map of location of a bridge proposed to be built by the second party at the site of and to replace the existing bridge at Park Street, one of

the three bridges over the Tidal Canal built by the first party as aforesaid;

Now, Therefore, in consideration of the premises and the mutual benefits resulting to the parties therefrom, the first party hereby transfers to the second party all its right, title and interest in and to the existing Park Street Bridge over and across the Tidal Canal in Alameda, California, being one of the three bridges built across said waterway pursuant to the aforesaid decree of the court, provided always that this transfer is made subject to the following covenants, to-wit:

1. That the second party at its own cost and expense will alter or replace the existing bridge and any bridge hereafter built over and across the Tidal Canal at Park Street, Alameda, California, to the satisfaction of the Chief of Engineers and the Secretary of War, when in the opinion of the Secretary of War such alteration or replacement may be necessary to permit improvement of the [115] channel or to render navigation in the Tidal Canal through and over such bridge reasonably free, easy and unobstructed.

2. That in the case of any bridge that may hereafter be built over and across the Tidal Canal at Park Street, Alameda, California, the ownership thereof shall be in the second party hereto.

3. That the second party will bear all costs and expenses incident to the future maintenance, operation and replacement of said bridge

or any bridge hereafter built at said location, and will forever save the first party harmless of all claims and liabilities that may arise by virtue of the responsibility and obligation of the first party under the above mentioned decree of the court to construct, maintain, operate and keep in repair a bridge at said location.

In Witness Whereof, the first party has caused this instrument to be signed by Geo. H. Dern, Secretary of War, and the official seal of the War Department to be hereunto affixed this 28th day of November, 1933, and the second party has caused its name to be signed and its official seal to be affixed hereto by the Chairman of the Board of Supervisors of the County of Alameda, State of California, this 24th day of October, 1933.

UNITED STATES OF
AMERICA,

[Seal] By GEO. H. DERN,
Secretary of War.

COUNTY OF ALAMEDA

[Seal] By WM. J. HAMILTON,
Chairman of the Board of
Supervisors of the County
of Alameda, State of Cali-
fornia.

(U. S. Engineer Office, Pacific Division, Oct. 30,
1933. San Francisco, Cal.) [116]

EXHIBIT II.

COPY OF AGREEMENT MADE AND ENTERED INTO BY AND BETWEEN THE UNITED STATES OF AMERICA AND THE COUNTY OF ALAMEDA, DATED THE 2ND DAY OF AUGUST, 1938, CONCERNING THE CONSTRUCTION OF THE HIGH STREET BRIDGE. [117]

Agreement

This agreement, made and entered into by and between the United States of America, acting by and through the Secretary of War, duly authorized, hereinafter designated as the first party, and the County of Alameda, State of California, acting by and through its Board of Supervisors, who are duly authorized, hereinafter designated as the second party, Witnesseth:

Whereas, by a decree of the District Court of the Third District of California (now known as the Superior Court of the State of California in and for the County of Alameda) rendered under date of September 30, 1882, the right of way for the Oakland Harbor Tidal Canal, California, a navigable waterway of the United States, was condemned, it was inter alia, ordered, adjudged and decreed that in the construction of said Canal the plaintiff, the United States and first party herein, at its own expense construct and keep in repair suitable bridges across the Canal on all the roads then used as public highways crossing the line of said Canal,

and also suitable railroad bridges on the then existing railroad tracks crossing the line of said Canal;

And whereas, thereafter, and in compliance with the above mentioned decree the first party constructed and maintained three bridges over and across said Canal;

And whereas, by Act of Congress approved June 25, 1910 (36 Stat. 630, 661), which included an appropriation for the further improvement of the harbor at Oakland, California, it was provided, inter alia, that the three bridges theretofore built by the United States in connection with that improvement [118] may be turned over to the local authorities, to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be deemed equitable and just to the United States and to said local authorities;

And whereas, by Act approved January 21, 1927 (44 Stat. 1010, 1014), Congress adopted a modification of the existing project for the improvement of Oakland Harbor, California, in accordance with and subject to the conditions set forth in House Document No. 407, 69th Congress, 1st Session, said conditions providing, inter alia, that local interests should alter or replace the bridges over the Tidal Canal, when, in the opinion of the Secretary of War, such alteration or replacement was deemed necessary in the interest of navigation and thereafter operate and maintain them;

And whereas, under dates of September 27 and

30, 1935, the Acting Chief of Engineers and The Acting Secretary of War, respectively, approved plans and map of location of a bridge proposed to be built by the second party at the site of and to replace the existing bridge at High Street, one of the three bridges over the Tidal Canal built by the first party as aforesaid;

Now, therefore, in consideration of the premises and the mutual benefits resulting to the parties therefrom the first party hereby transfers to the second party all its right, title and interest in and to the existing High Street Bridge over and across the Tidal Canal in Alameda, California, being one of the three bridges built across said waterway pursuant to the aforesaid decree of the court, provided always that this transfer is made subject to the following covenants, to-wit: [119]

1. That the second party at its own cost and expense will alter or replace the existing bridge and any bridge hereafter built over and across the Tidal Canal at High Street, Alameda, California, to the satisfaction of the Chief of Engineers and the Secretary of War, when in the opinion of the Secretary of War such alteration or replacement may be necessary to permit improvement of the channel or to render navigation in the Tidal Canal through and over such bridge reasonably free, easy and unobstructed.

2. That in the case of any bridge that may hereafter be built over and across the Tidal Canal at High Street, Alameda, California, the

ownership thereof shall be in the second party hereto.

3. That the second party will bear all costs and expenses incident to the future maintenance, operation and replacement of said bridge or any bridge hereafter built at said location, and will forever save the first party harmless of all claims and liabilities that may arise by virtue of the responsibility and obligation of the first party under the above-mentioned decree of the court to construct, maintain, operate and keep in repair a bridge at said location.

In witness whereof the first party has caused this instrument to be signed by Louis Johnson, Acting Secretary of War, and the official seal of the War Department to be hereunto affixed this 2d day of August, 1938, and the second party has caused its name to be signed and its official seal to be affixed hereto by the Chairman of the Board of Supervisors of the County of Alameda, State of California, this 30th day of June, 1938.

[Seal]

UNITED STATES OF
AMERICA

By LOUIS JOHNSON

Acting Secretary of War.

COUNTY OF ALAMEDA

[Seal]

By WM. J. HAMILTON

Chairman of the Board of
Supervisors of the County
of Alameda, State of Cali-
fornia. [120]

EXHIBIT III.

COUNTY OF ALAMEDA, a Body Corporate and
Politie and a Political Subdivision of the State
of California, Petitioner,

vs.

HORACE P. ROSS, as Auditor of the County of
Alameda, State of California, Respondent,
32 Cal. App. (2d) 135; 89 Pac. (2d) 460, (As
contained in said California Appellate Re-
ports.) [121]

“(1) Counties — Bridges — Contracts—Licenses
—Revocation—Mutuality—Consideration. — Where
a license, such as that from the federal government
to the County of Alameda authorizing the latter to
use and operate three certain bridges across the
Oakland estuary, is subject to the control of the
Secretary of War and is revocable at will, either
with or without cause, such license lacks mutuality
of obligations and consideration, which renders it
void, and such licensee is not authorized to incur in-
debtedness or to expend public moneys in repairing
or maintaining the portion of one of the bridges
which is used exclusively for the benefit of a rail-
road company.

“(2) Id.—Licenses — Improvements — Revoca-
tion.—Under certain circumstances a license which
is ordinarily revocable at will may become irrevoc-
able by the licensor, when the licensee, acting in

good faith under the terms of the instrument, constructs valuable improvements on the property, making it unjust to permit the cancellation without first compensating the licensee for his loss and expenditure of money, but that principle has no application where the specific terms of the license contemplate payment by the licensee for maintenance, repairs and reconstruction of bridges with the absolute right of revocation in spite of such expenditures.

“(3) *Id.*—Contracts—Private Benefits—Illegal Contributions.—The board of supervisors of Alameda County had no power to bind the county to a contract which bound it to pay for maintenance and improvements for the sole benefit of a private railroad corporation, and to maintain, repair and construct the Oakland estuary bridges with full knowledge that upon completion thereof the contract was subject to immediate revocation, and such contract was void for lack of mutuality and consideration, and it constituted an illegal contribution of public funds for the benefit of a private railroad corporation.

“(4) *Id.*—Revocable Licenses—Vested Rights—Easements.—Where the document, by the terms of which the federal government authorized the operation and use by the County of Alameda of the three Oakland estuary bridges, was revocable at the pleasure of the Secretary of War, at any time and with or without cause, a mere conditional license or privilege was created, and the use of the word ‘grant’ did

not have the effect of creating any vested interest or easement in the bridges which would include an interest in real property.

“(5) *Id.*—Contracts — Certainty — Mutuality—Consideration.—Agreements are void which contain indefinite and uncertain provisions with respect to the obligations and for lack of mutuality, and consideration, particularly when they contain an absolute and unconditional right of revocation by either party. [122]

“(6) *Id.*—Licenses—Consideration—Prior Expenditures.—Where the document giving to the County of Alameda the right to operate and use the three Oakland estuary bridges was lacking in mutuality, and it was uncertain and revocable at will, rendering the county liable for the expenditure of large sums of public money for the sole benefit of a private railroad corporation with no assurance of retaining the privilege of operating and using the bridges for a single day, there was no merit in the contention that the installation of electrical apparatus by the federal government for the opening and closing of the draw-bridges, under the terms of the license prior to its execution, furnished an independent consideration which made the agreement binding.

“(7) *Id.*—Corporate Powers—Agents—Notice—Indebtedness — Statutory Construction. — The County of Alameda is a body corporate and politic, possessing only such powers as are specifically granted to it by law, together with such other

powers as may be necessarily implied therefrom, and any person contracting with a county or municipal corporation is bound to recognize such limitations of power; and a board of supervisors is merely the agent of the county, and its powers with respect to incurring municipal indebtedness should be determined by a strict construction of the law.

“(8) *Id.*—Public Funds—Gifts—Constitutional Law.—The board of supervisors of Alameda County has no authority to incur indebtedness or expend public funds for the sole benefit of a private railroad corporation, and the payment of such an indebtedness is in the nature of a gift or free contribution to the corporation, and is illegal and void.

“Proceedings in Mandamus to compel the Auditor of Alameda County to issue a warrant in payment of materials for bridge repairs. Writ denied.

“The facts are stated in the opinion of the court.

“Earl Warren, District Attorney, Ralph E. Hoyt, Chief Assistant District Attorney, and James H. Oakley and Robert H. McCreary, Deputies District Attorney, for Petitioner.

“John R. Ober for Respondent.

“Thompson, J.—The petitioner seeks by means of a writ of mandamus to compel the respondent to issue a warrant in payment for materials ordered by the board of supervisors of Alameda County with which to repair a part of the Fruitvale Avenue bridge across the Oakland estuary, which portion of the bridge is used exclusively for the benefit of the Southern Pacific Railroad Company. [123]

“The respondent contends there is no valid contract or legal authorization for the County of Alameda to incur or pay the indebtedness for maintaining or repairing that portion of the bridge which is used exclusively for the benefit of a private corporation for the reason that such expenditures constitute a gift of money from the county which is prohibited by law, and because the license or agreement from the United States for the County of Alameda to use and maintain the bridge is specifically revocable at will and is therefore invalid for lack of mutuality of obligations and is void for lack of consideration.

“This proceeding is presented to this court on a written stipulation of facts.

“The cities of Oakland and Alameda are both located in Alameda County adjacent to the eastern shore of San Francisco Bay. These cities are separated by a navigable inlet and canal some seven miles in length commonly termed the Oakland estuary. This body of water extends inland from Oakland harbor connecting with Brooklyn basin, which contains docking facilities. A canal unites the lower extremity of Brooklyn basin with the upper point of San Leandro Bay, which is an arm of San Francisco Bay situated a few miles southeasterly from Oakland harbor. This tidal canal, which connects Brooklyn basin with San Leandro Bay, was dredged by the United States Government to permit passage of vessels from San Leandro Bay to the inner harbor. It is two miles in length and about three hun-

dred feet in width. The entire estuary, including the canal, is navigable for large vessels.

“In 1882 the United States condemned three rights of way across this canal between Oakland and Alameda for the construction and maintenance of the Fruitvale Avenue, High and Park Street bridges. The County of Alameda, the Central Pacific Railroad Company and certain individuals were named as parties defendant in that action. [124] None of the defendants asked for damages. The decree provided that:

“‘It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair SUITABLE BRIDGES ACROSS THE SAME on all the roads now used as public highways crossing the line of said canal and also SUITABLE RAILROAD BRIDGES on the present railroad tracks crossing the line of said canal.’

“In 1901 the government constructed the Fruitvale Avenue bridge and the other two bridges across the estuary, each of which it maintained and operated until 1913. September 3, 1910, the Secretary of War issued to the board of supervisors of Alameda County, pursuant to an act of Congress authorizing ‘appropriations for the construction, repair and preservation of certain public works on rivers and harbors’ (36 U. S. Stat. 630,661), the revocable license to maintain and operate the three bridges, which license is the subject of controversy in this proceeding. That document reads in part:

“ “ “Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, that of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer;”

“ “Now Therefore, Under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the [125] Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

“ “This License is granted subject to the following conditions and provisions:

“ ‘1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall

desire to use the bridges, or any one of them, each shall bear its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

“ ‘2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

“ ‘3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tender houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

“ ‘4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

“ ‘5.—That said Board of Supervisors shall maintain the necessary number of bridge tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.’ [126]

“November 19, 1913, the board of supervisors of Alameda County adopted a resolution accepting the license according to the terms expressed therein,

and thereafter repaired and operated the three bridges. The Fruitvale Avenue bridge is a combination swinging span supported by a single central concrete pier which may be opened for the passing of vessels. A portion of that bridge is used exclusively for the tracks of the Southern Pacific Railroad Company. The remaining portion of the bridge is used for vehicles and pedestrians. These two portions of the bridge are separated by an open steel partition. the traffic over that bridge has so increased with the growth of population that an average of more than 4,000 vehicles crossed it daily in 1937. During that year the bridge was opened six times a day to permit vessels to pass to and from the inner harbor.

“The bridges require expenditures of large sums of money to repair and operate them. It is conceded the Fruitvale Avenue bridge now requires the expenditure of considerable money for immediate repairs and that it will soon be necessary to replace it at an estimated cost of approximately \$1,250,000. For necessary immediate repairs of the railroad portion of the Fruitvale Avenue bridge, for the sole use and benefit of the tracks of the railroad company, the board of supervisors authorized the purchase of iron bolts and materials of comparatively small value, which were furnished and delivered. A claim for the agreed price of said materials was presented, approved and allowed by the board of supervisors pursuant to section 4076 of the Political Code. Upon presentation of that claim the county

auditor refused payment on the ground that it is illegal and based on a void contract which he is not authorized to pay. Thereupon this petition for a writ of mandamus was filed to compel the auditor to draw his warrant in payment of the claim.

“The claim which is involved in this proceeding is relatively small, but the issues of this case are of great public interest [127] since the County of Alameda soon will be compelled to replace the Fruitvale Avenue bridge at a cost in excess of a million and a quarter dollars with a possibility of losing the entire sum of money by an immediate revocation of the license.

“The respondent asserts that the claim is illegal and that the County of Alameda is not authorized to incur indebtedness to repair or rebuild, at least that portion of the Fruitvale Avenue bridge which is used exclusively for the benefit of a private railway corporation, because the license is revocable at will by the Secretary of War, which renders it void, and the expenditure of public funds under such circumstances is in the nature of a gift which is prohibited by article IV, section 31, of the Constitution of California.

“(1) We are of the opinion the license from the United States does not authorize the County of Alameda to incur indebtedness or to expend public money in repairing or maintaining that portion of the Fruitvale Avenue bridge which is used exclusively for the benefit of the Southern Pacific Railroad Company, for the reason that the license is

revocable at will by the Secretary of War and therefore lacks mutuality of obligations and consideration, which renders it void, and because the particular indebtedness which is involved in this proceeding constitutes a gift of public funds to a private corporation in conflict with article IV, section 31, of the Constitution of California.

“The license in question is an executory agreement authorizing the County of Alameda to retain the use and operation of the estuary bridges for an indefinite length of time, subject, however, to the control of the Secretary of War, and absolutely revocable at his will without cause therefor. It is apparent from the terms of the license that the County of Alameda will soon be called upon to reconstruct the Fruitvale Avenue bridge at an expense of [128] approximately \$1,250,000, immediately upon the completion of which the government may revoke the agreement appropriate the benefits of the vast expenditure of money by the county, and resume its exclusive operation and control of the bridges. Under the uniform authorities such an agreement is held to be void for lack of mutuality of obligations and for lack of consideration.

“(2) Under certain circumstances a license which is ordinarily revocable at will may become irrevocable by the licensor, when the licensee, acting in good faith under the terms of the instrument, constructs valuable improvements on the property, making it unjust to permit the cancellation without first fully compensating the licensee for his loss and

expenditure of money. (2 Tiffany on Real Property, 2d ed., p. 1206, sec. 349 (d).) But that principle has no application to the present circumstances. The specific terms of this license contemplates payment by the County of Alameda for maintenance, repairs and reconstruction of the bridges with the absolute right of revocation in spite of such expenditures. The county was not deceived into believing it could acquire vested unrevocable rights in the bridges by incurring such expenditures. (3) The language of the license clearly requires the county to pay for maintenance and improvements for the sole benefit of a private railroad corporation, and to maintain, repair and reconstruct the bridges with full knowledge that upon completion thereof the contract is subject to immediate revocation. The board of supervisors had no power to bind the county to such an illegal contract. It is absolutely void for lack of mutuality and consideration. It also constitutes an illegal contribution of public funds for the benefit of a private corporation.

“(4) The document, by the terms of which the government authorizes the operation and use of the bridges by the County of Alameda, appears to be a mere conditional license or privilege to [129] use the bridges for the convenience of public traffic, which is revocable at the pleasure of the Secretary of War at any time with or without cause. In spite of the use of the term ‘grant’ which is employed in the instrument it seems clear that the government carefully refrained from conveying an easement in

the bridges which would include an interest in real property. The instrument provides that:

“ ‘The three bridges...may be TURNED OVER to the local authorities TO BE MAINTAINED AND OPERATED BY THEM UPON SUCH TERMS AS TO TRANSFER AND CONTROL AS IN THE DISCRETION OF THE SECRETARY OF WAR MAY BE EQUITABLE AND JUST to the United States and to said local authorities . . .

“ ‘. . . The Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, A LICENSE REVOCABLE AT WILL BY THE SECRETARY OF WAR, to assume control of the said three (3) bridges . . .

“ ‘This License is granted subject to the following conditions and provisions:

“ ‘1.—That the three bridges shall be freely open to all public traffic without charge, . . .

“ ‘2.—. . . Said three bridges shall be under the supervision of the Engineer Officer of the United States Army, . . .

* * * *

“ ‘4.—The said Board of Supervisors shall maintain these bridges, attending to all necessary repairs and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.’

“ ‘Among the burdens or servitudes imposed upon land which may be conveyed, although not attached to land, are rights of way (Sec. 802, Civ. Code.) We

may assume that the right or privilege to use the bridges, under the circumstances of this case, constitutes [130] a license and not an easement which is attached to the land. Ordinarily, an easement is a permanent interest in the realty, while a license, at least so long as it is executory, may be revoked at pleasure. (1 Thompson on Real Property, p. 362, sec. 282; *Davis v. Tway*, 16 Ariz. 566 (147 Pac. 750, L. R. A. 1915E, 604); *Eastman v. Piper*, 68 Cal. App. 554 (229 Pac. 1002).)

“A right of way is primarily a privilege to pass over another’s land. It does not exist as a natural right, but must be created by a grant or by its equivalent. Such rights of way may be either public or private. (2 Tiffany on Real Property, p. 1249, sec. 358.) A license may be revoked either by express words to that effect, or by the acts and conduct of the licensor. (2 Tiffany on Real Property, p. 1218, sec. 349 (d) and (e).) It is clear that the language employed in the license for the County of Alameda to use the bridges for public traffic, expressly reserves the right in the government to revoke that privilege at will, with or without cause. It therefore conveys to the County of Alameda no vested right to retain the operation and use of the bridges for any specific time notwithstanding the fact that the county has expended large sums of money in maintaining, improving and repairing the bridges. It may also suffer tremendous loss by incurring indebtedness for that purpose in the immediate future. (2 Tiffany on Real Property, pp.

1212, 1213.) Although the county may expend \$1,-250,000 in rebuilding the Fruitvale Avenue bridge, it would thereby acquire no vested interest in that bridge which may not be forfeited at any moment by the exercise of the express reservation contained in the license to revoke it at the will of the government.

The instrument in question is in the nature of a promise or agreement on the part of the government to permit the County of Alameda to operate and use the bridges for public traffic. Since it contains an express provision that it may be revoked at will, [131] it creates no vested interest in the County of Alameda, and therefore lacks mutuality of obligations and also lacks consideration necessary to render it binding. In 1 Williston on Contracts, revised edition, page 123, section 43, it is said:

“ ‘One of the commonest kind of promises too indefinite for legal enforcement is where the promissor retains an unlimited right to decide later the nature or extent of his performance. This unlimited choice in effect destroys the promise and makes it merely illusory. . . .

“ ‘ . . . A promise to give anything whatever which the promissor may choose, or to do or give something whenever the promissor pleases, is illusory, for such promises would be satisfied by giving something so infinitely near nothing or by performance so infinitely postponed as to have no calculable value. FOR THE SAME REASON IF

ONE PARTY TO AN AGREEMENT RESERVES AN UNQUALIFIED RIGHT TO CANCEL THE BARGAIN NO LEGAL RIGHTS CAN ARISE FROM IT WHILE IT REMAINS EXECUTORY.'

"Likewise, it is said in 1 Williston on Contracts that when one of the parties reserves the unqualified right to cancel the agreement at will it fails for lack of consideration. That text, page 352, section 104, reads:

" 'In any case where a promise in terms or in effect provides that the promissor has a right to choose one of two alternatives, and by choosing one will escape without suffering a detriment or giving the other party a benefit, the promise in insufficient consideration. THE SAME CONSEQUENCES FOLLOW WHERE A BILATERAL AGREEMENT IN QUESTION EXPRESSLY RESERVES TO ONE PARTY THE RIGHT OF IMMEDIATE CANCELLATION AT ANY TIME.'

On page 365, section 105, of the last cited authority it is further said:

" 'That a promise which in terms reserves the option of [132] performance to the promissor is insufficient to support a counter-promise is well settled. And the promise is no more effectual because the condition contained in it is in the form a condition subsequent rather than a condition precedent. As has been seen an agreement which one party reserves the right to cancel at his pleasure cannot create a contract.

“ ‘Since the courts, however, do not favor arbitrary cancellation clauses, the tendency is to interpret even a slight restriction on the exercise of the right of cancellation as constituting such legal detriment as will satisfy the requirement of sufficient consideration; for example, where the reservation of right to cancel IS FOR CAUSE, or by written notice, or after a definite period of notice, or upon the occurrence of some extrinsic event, or other objective standard.’

“ ‘Mutuality of obligations is an essential element in every binding contract. In the present case there is an absolute absence of mutuality for the reason that the government may cancel the agreement and deprive the County of Alameda of the use or control of the bridges at any moment without cause. In 13 Corpus Juris, page 337, section 188, it is said:

“ ‘Where one party reserves an absolute right to cancel or terminate the contract at any time mutuality is absent . . . It has been held that a contract which provides that it may be cancelled by either party is invalid for lack of mutuality, although the provision for cancellation is limited by an agreement that it shall be “for just cause”, there being no means furnished for determining what may have been the particular cause or causes thereby intended by both parties.’

“ ‘There is not the slightest intimation in the license which is involved in this proceeding that the government reserves the right to revoke the use and operation of the bridges only for [133] ‘good

cause'. A careful reading of the document leaves no doubt it was the intention of the government, clearly expressed in unequivocal language, that it reserves the absolute right to revoke the license at will with or without cause. It contains no limitation whatever upon that arbitrary power. It is therefore void for lack of mutuality and for lack of consideration.

“(5) It has been frequently held that agreements are void which contain indefinite and uncertain provisions with respect to the obligations and for lack of mutuality, and consideration, particularly when they contain an absolute and unconditional right of revocation by either party. (*Hamlin v. Barnhart*, 26 Cal. App. 632 (147 Pac. 1188); *Charles Brown & Sons vs. White Lunch Co.*, 92 Cal. App. 457 (268 Pac. 490); *Shortell vs. Evans-Ferguson Corp.*, 98 Cal. App. 650 (277 Pac. 519); *Naify vs. Pacific Indemnity Co.*, 11 Cal. (2d) 5 (76 Pac. (2d) 663, 115 A. L. R. 476); *Motor Car Supply Co. v. General Household Utilities Co.*, 80 Fed. (2d) 167; *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 296 Fed. 693; *Ellis v. Dodge Bros.*, 237 Fed. 860; *City of Pocatello v. Fidelity & Deposit Co. of Maryland*, 267 Fed. 181; *Console Master Speaker Corp. v. Muskegon Wood Products Corp.*, 3 W. W. Harr. (Del.) 390 (138 Atl. 598); *Du Pont De Nemours & Co. v. Claiborne-Reno Co.*, 64 Fed. (2d) 224, 232 (89 A. L. R. 238).)

“(6) There is no merit in the petitioner's contention that the installation of electrical apparatus

by the government for the opening and closing of the draw-bridges, under the terms of the license prior to its execution, furnishes an independent consideration which makes the agreement binding. It still lacks mutuality. It is uncertain and revocable at will, rendering the county liable for the expenditure of large sums of public money for the sole benefit of a private corporation with no assurance of retaining the privilege of operating and using the bridges for a single day.

“(7) The County of Alameda is a body corporate and [134] politic, possessing only such powers as are specifically granted to it by law, together with such other powers as may be necessarily implied therefrom. (Sec. 4000, Pol. Code.) Any person contracting with a county or municipal corporation is bound to recognize such limitations of power. (*Hurst v. City of Burlingame*, 207 Cal. 134 (277 Pac. 308); *City and County of San Francisco v. Boyle*, 195 Cal. 426 (233 Pac. 965); *Ellis Landing & Dock Co. v. City of Richmond*, 70 Cal. App. 720 (234 Pac. 336); *Frisbee v. O'Connor*, 119 Cal. App. 601 (7 Pac. (2d) 316); 18 Cal. Jur. 797, sec. 105; 1 *McQuillin's Municipal Corp.*, 2d ed., p. 909, sec. 367.) Boards of supervisors are merely the agents of the county. (Sec. 4001, Pol. Code; *Contra Costa County v. Soto*, 138 Cal. 57 (70 Pac. 1019); *County of Modoc v. Spencer*, 103 Cal. 498 (37 Pac. 483).) The powers of a board of supervisors with respect to incurring municipal indebtedness should be determined by a strict construction of the law.

(*Hurst v. City of Burlingame*, *supra*; *Egan v. San Francisco*, 165 Cal. 576 (133 Pac. 294, Ann. Cas. 1915A, 754).) Quoting with approval from *Linden v. Case*, 46 Cal. 171, it is said in *County of Modoc v. Spencer*, *supra*, at page 502:

“ ‘It is settled in this state that no order made by a board of supervisors is valid or binding unless it is authorized by law. No claim against a county can be allowed, unless it be legally chargeable to the county; and if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liability.’

“Section 4005 of the Political Code provides that:

“ ‘All contracts, authorizations, allowances, payments, and liabilities to pay, made or attempted to be made in violation of law, shall be absolutely void, and shall never be the foundation or basis of a claim against the treasury of such county. And all officers of said county are charged with notice of the condition of the [135] treasury of said county, and the extent of the claims against the same.’

“(8) The board of supervisors of Alameda County had no authority to incur indebtedness or expend public funds for the sole benefit of the Southern Pacific Railroad Company, a private corporation. It appears that the materials which are involved in this proceeding are solely for the improvement and benefit of the Southern Pacific Rail-

road Company tracks across the bridge. The payment of the indebtedness which is here involved is in the nature of a gift or free contribution to the corporation, and it is, therefore, illegal and void. (Art. IV, sec. 31, Const. of Cal.; *County of Los Angeles v. Jessup*, 11 Cal. (2d) 273 (78 Pac. (2d) 1131); *Goodall v. Brite*, 11 Cal. App. (2d) 540 (54 Pac. 2d) 510); *First Nat. Bank of Orland v. Ball*, 90 Cal. App. 709 (266 Pac. 604); *Powell v. Phelan*, 138 Cal. 271 (71 Pac. 335).) In *Higgins v. San Diego Water Co.*, 118 Cal. 524 (45 Pac. 824, 50 Pac. 670), it was held that a contract by a municipal corporation to pay public funds to a corporation or to an individual for the construction of a railroad is violative of article IV, section 31, of the Constitution and, therefore, void.

“The respondent also asserts that the indebtedness which is based on the agreement or license which may obligate the County of Alameda to expend \$1,250,000 to rebuild the Fruitvale Avenue bridge in the near future is in conflict with the provisions of article XI, section 18, of the Constitution of California, for the reason that it would incur an indebtedness exceeding the limited revenues provided by law for a single current year. It has been definitely determined, as it is said in *Arthur v. City of Petaluma*, 175 Cal. 216 (165 Pac. 698), that the preceding constitutional provision means:

“ ‘Not only that an indebtedness incurred contrary to its express provisions was absolutely void, but that “each year’s income [136] and revenue

must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year".'

"But the stipulated facts (paragraph XXV) show that the indebtedness directly involved in this proceeding does not exceed the cash balance which has been appropriated and now remains to the credit of the Fruitvale Avenue bridge fund. The issues presented in this proceeding do not necessarily include a determination as to whether an expenditure of money for the reconstruction of the bridge would exceed the revenue available for that purpose in that particular year and therefore be violative of the constitutional provision last mentioned. Accordingly, we refrain from deciding that question.

"For the reasons that the agreement or license lacks mutuality of obligations of the respective parties, that it lacks valid consideration because it is revocable at will, by the government, without cause, and that the claim involved constitutes an illegal appropriation of public funds for the sole benefit of a private corporation, it is void.

"The peremptory writ of mandamus is denied.

"Tuttle, J., and Pullen, P. J., concurred.

"An application by petitioner to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on June 1, 1939." [137]

EXHIBIT IV.

Copy of Letter Dated December 8, 1938, Addressed to Office of United States District Attorney by Attorney for Petitioner in County of Alameda vs. Ross. [138]

December 8th, 1938

W. E. Licking, Esq.,
Assistant U. S. District Attorney
Post Office Building,
San Francisco, California.

In re: County of Alameda
vs. Horace P. Ross

Dear Bill:

Pursuant to your recent telephone conversation with James Oakley, of this office, please find enclosed herewith copies of the following in the above entitled matter:

1. Petition for Writ of Mandate;
2. Petitioner's Points and Authorities on Application for Writ of Mandate;
3. Alternative Writ of Mandate; and
4. Order transferring action to the District Court of Appeal of the Third Appellate District.

Very truly yours,

EARL WARREN

District Attorney

By ROBERT H. McCREARY

Deputy

RHMcC:CA

Encls. [139]

EXHIBIT V.

Copy of Letter Dated January 3, 1939, Addressed
to Office of United States District Attorney
by Attorney for Respondent in County of Alameda vs. Ross. [140]

January 3, 1939

W. E. Licking, Esq.,
Assistant United States Attorney,
Post Office Building,
San Francisco, California.

Dear Sir:

Ralph E. Hoyt, District Attorney of the County of Alameda, has requested me as Attorney for Horace P. Ross, respondent in the matter of the County of Alameda v. Horace P. Ross, as Auditor of the County of Alameda, to send you the enclosed Respondent's Answer to Petition for Writ of Mandate and his Points and Authorities in support thereof.

The above entitled matter will be submitted on briefs in the District Court of Appeal of the State of California, in and for the Third Appellate District on January 4, 1939.

Very sincerely yours,

JOHN R. OBER

JRO:AC [141]

EXHIBIT VI

Copy of Letter Dated January 3, 1939, Addressed
to Office of United States District Attorney
by Attorney for Petitioner in County of Ala-
meda vs. Ross. [142]

January 3, 1939.

Wm. E. Licking, Esq.,
Assistant United States Attorney,
Post Office Building,
San Francisco, California.

Dear Sir:

Please find enclosed the Agreed Statement of Facts and Petitioner's Reply to Respondent's Answer and Points and Authorities, and Stipulation to submit on briefs filed in the proceeding entitled County of Alameda vs. Horace P. Ross, as Auditor of the County of Alameda.

The above matter will be submitted on briefs in the District Court of Appeal of the State of California, in and for the Third Appellate District at Sacramento on January 4, 1939.

Very sincerely yours,

RALPH E. HOYT,

District Attorney.

By ROBERT H. McCREARY,

Deputy.

RHM:AC

Enclosures

Service of the within answer and counterclaim
by copy admitted this 7th day of February, 1940.

W. E. LICKING,

Ass't U. S. Attorney,

Attorney for Plaintiff.

[Endorsed]: Filed Feb. 7, 1940. [143]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Thursday, the 21st day of March, in the year of
our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback, Dis-
trict Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, ETC.

This case came on regularly this day for trial
before the Court. Brice Tool, Esq., Special Assist-
ant to the Attorney General, and Wm. E. Licking,
Esq., Assistant United States Attorney, were pres-

ent for and on behalf of the United States. J. F. Coakley, Esq., and Robert H. McCreary, Esq., appearing as attorneys for the County of Alameda, and E. J. Foulds, Esq., appearing as attorney for the Southern Pacific Co., and Central Pacific Ry. Co. Mr. Tool gave a statement of the case to the Court. Henry S. Pound was sworn and each testified on behalf of the United States. Plaintiff introduced into evidence exhibits marked Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12. Ordered the further trial of this case continued to March 22nd, 1940. [144]

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS

It Is Hereby Stipulated by and between the parties hereto by their respective attorneys that the following facts are true and that the cause of action may be submitted to and be decided by the Court, after written memoranda followed by oral argument, upon the facts hereinafter set forth and the exhibits hereto attached which are expressly made a part of this Agreed Statement of Facts, and such other evidence as may by either party be offered and by the Court admitted in the case. With the exception of the relief prayed for, this stipulation completely supersedes and is exclusive of the pleadings filed by the parties to this action.

I.

This is a suit of a civil nature brought by the United States to enforce certain alleged duties of

the defendant, County of Alameda, [147] claimed to arise out of certain facts, proceedings, records and documents hereinafter set forth as to the correct interpretation and legal effect of which there is an actual, existing controversy between the parties hereto, and the Court is requested by plaintiff and defendants to declare the rights, duties and obligations of the parties therein, and to decree performance accordingly.

II.

The County of Alameda was at all times herein mentioned, and now is a body corporate and politic, and a political subdivision of the State of California. The Central Pacific Railway Company, and the Southern Pacific Company are private corporations, duly authorized and licensed to do business within the State of California, and are engaged in the business of operating railroad lines within and without said State and are the owners of, or claim some interest in, certain railway rights of way within the said County of Alameda in or over the Tidal Canal described hereafter, and more particularly in, over and upon the Fruitvale Avenue Bridge hereinafter mentioned.

III.

This action arises under Section 24 (1) and Section 274 (d) of the Judicial Code, as amended.

IV.

The City of Alameda and the City of Oakland are both situated upon the east shore of San Fran-

cisco Bay, a navigable body of water. Both said cities are located within Alameda County, State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San Antonio Estuary, Oakland Estuary, Oakland Harbor, Inner Harbor and Tidal Canal and Alameda Estuary. Said body of water is roughly seven miles in length, extending in a general east and west direction from San Leandro Bay, an arm of San Francisco Bay, on the east, to another point in San Francisco Bay proper at the end [148] of the moles of the Southern Pacific Railroad Company and the Western Pacific Railroad Company on the west. Said Estuary constitutes what is commonly known as 'Oakland's inner harbor; the outer harbor extending in a northeasterly direction for about two miles from the entrance to the inner harbor. The westerly end of the Estuary, for a distance of about two miles, is an entrance channel, protected by stone retaining walls on either side. Said entrance channel varies from Seven Hundred and Fifty to Eight Hundred and Fifty feet in width. Immediately east of said entrance channel lies the main portion of the inner harbor, with docking facilities; the width of the channel here being Six Hundred feet, and the natural harbor varying from Six Hundred and Fifty feet at the narrowest points to about Three Thousand Five Hundred Feet at the easterly end where the harbor widens to form what is known as Brooklyn Basin.

Easterly of Brooklyn Basin and forming a continuous part of the same body of water is the "Tidal Canal" nearly two miles in length connecting the inner harbor with San Leandro Bay. Said Tidal Canal was originally dredged by the United States for the purposes set forth in the condemnation proceedings entitled the United States, plaintiff, vs. Crooks, County of Alameda, Central Pacific Railroad Company, et al., defendants, hereinafter referred to. With reference to variations in the water level in said Tidal Canal, it is hereby stipulated that the Court may take judicial notice of the data as to height of high and low water contained in a booklet entitled "Tide Tables Pacific Ocean and Indian Ocean 1940, United States Department of Commerce, Coast and Geodetic Survey."

V.

In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of \$100,000 was appropriated "for the improvement of Oakland Harbor;" (18 Stat. 237, c. 457) to be expended under the direction of the Secretary of War. [149]

In 1876 the United States instituted a condemnation proceeding in the District Court of the Third Judicial District in and for the State of California (now the Superior Court of the State of California, in and for the County of Alameda) to acquire a right of way for the said Tidal Canal, said action being entitled The United States, plain-

tiff, v. Crooks, County of Alameda, Central Pacific Railroad Company, et al., defendants, action No. 3590 in the records of the County Clerk of the County of Alameda for the District Court of the Third Judicial District, the State of California, in and for the County of Alameda. A full and true copy of each of the following documents in said condemnation proceeding is hereto attached, marked as designated and thus by reference is incorporated herein and made a part hereof:

Exhibit 1 (a) Complaint;

Exhibit 1 (b) Map of Tidal Canal (This map, prepared by United States Army Engineers Office in 1882, is attached in lieu of maps and surveys referred to in the Complaint in United States v. Crooks);

Exhibit 1 (c) Opinion and Decision;

Exhibit 1 (d) Findings of Fact and Conclusions of Law;

Exhibit 1 (e) Decree.

VI.

In said suit the County of Alameda and the Central Pacific Railroad Company were named, among others, as defendants and the United States sought to condemn the rights of the County and of the railroad in certain highways and railroad rights of way which crossed the proposed Tidal Canal at the places where the Fruitvale Avenue, High and Park Street bridges are now located, and at Washington Avenue, where a railroad right of way was

then located. The right of way and tracks of the Central Pacific Railroad Company, which crossed the proposed Tidal Canal at Fruitvale Avenue, paralleled and adjoined the right of way of the county road belonging to the defendant, County of Alameda, which also crossed the proposed Tidal Canal at Fruitvale Avenue.

The County of Alameda and the railroad company asked for no damages in said condemnation proceedings, and in the decree in said action hereinabove referred to, it was provided, among other things:

“Defendants, the County of Alameda, The Central Pacific Railroad Company, Charles Heinecke and S. A. Smith, not having claimed damages, no damages are awarded to them.

“It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal.”

VII.

After said decree of condemnation, the United States constructed said Tidal Canal to the extent shown on a map hereto attached and marked Exhibit 2 and thus by reference is incorporated herein and made a part hereof, and constructed, and until

November 17, 1913, maintained and operated highway drawbridges at Park Street and High Street, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue. Although said map is dated 1912, said map actually shows the conditions of said Tidal Canal and of said bridges as they existed prior to 1909. The Park Street Bridge was completed in 1891; the High Street and Fruitvale Avenue Bridges were completed in 1901 and said construction of said Tidal Canal was completed in 1903.

The bridges were constructed as drawbridges of the swing type, turning or pivoting horizontally upon central piers, and were equipped with hand-operated machinery. It took approximately thirty minutes to open and thirty minutes to close each of these bridges. After these bridges were equipped with electrical operating machinery, [151] as hereinafter set forth, it took from two to three minutes to open, and the same time to close each of said bridges.

Prior to said installation of electrical operating machinery the United States did not regularly operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions also opened and closed said bridges on their own responsibility for the passage of vessels which could not clear said bridges when closed; and boats, barges and scows which could clear said bridges when closed plied up and down said Tidal Canal.

VIII.

Prior to the institution of said condemnation proceedings the Central Pacific Railroad Company (predecessor of defendant Central Pacific Railway Company) was the owner of two lines of railroad extending across the lands sought to be condemned. One line of said railroad was on or adjoining Fruitvale Avenue, and the other line was on or adjoining Washington Avenue, across the site of the proposed Tidal Canal, in said Alameda County, and the said Central Pacific Railroad Company was the owner of rights of way in said two lines of railroad, and was a party defendant in said condemnation proceedings.

IX.

On March 7, 1901, an agreement in writing was entered into between the United States, Central Pacific Railway Company (said Central Pacific Railway Company having succeeded to the interest of said Central Pacific Railroad Company) and the Southern Pacific Company (lessee of Central Pacific Railway Company), under which agreement the Central Pacific Railway Company in consideration of \$50,000 agreed to abandon its line of railroad on or adjoining Washington Avenue, and to relieve the United States of any obligation to construct or maintain a drawbridge across said Tidal Canal [152] at Washington Avenue. A full and true copy of said agreement is attached to the complaint herein marked Exhibit II thereof and thus by reference is made a part hereof.

X.

On December 6, 1909, the Board of Supervisors of Alameda County adopted a Resolution, a full and true copy of which is hereto attached and marked Exhibit 3 and thus by reference is incorporated herein and made a part hereof.

XI.

In the Rivers and Harbors Act, approved June 25, 1910, 36 Stat. 630, c. 382, it is provided, *inter alia*, as follows:

“Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities: Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer.”

XII.

Thereafter, on September 3, 1910, the Secretary of War issued a license to the County reading in part as follows:

“unto the Board of Supervisors of Alameda County, California, a License, revocable at

will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.”

A full and true copy of said license is hereto attached and marked Exhibit 4 and thus by reference is incorporated herein and made a part hereof.

XIII.

Thereafter, on November 10, 1913, the Board of Supervisors of Alameda County adopted a resolution, a full and true copy of which is attached hereto and marked Exhibit 5 and thus by reference is incorporated herein and made a part hereof.

[153]

XIV.

Thereafter the said bridges were operated, repaired and maintained at the expense of said County and have been so repaired, maintained and operated except that the bridges at Park Street and High Street have been reconstructed and are now operated, repaired and maintained under other arrangements between the United States and said County which are of no significance to the present case.

XV.

The total cost to the United States for the repair and electrification of said Fruitvale Avenue, High Street and Park Street Bridges was \$21,358.80.

The annual cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge commencing during the fiscal year 1913-

14 to and including the fiscal year 1938-39 is hereinafter set forth. The annual costs paid by the County of Alameda for maintaining and operating the High Street and Park Street Bridges commencing during the fiscal year 1913-14 to the respective fiscal year of commencement of reconstruction of the High Street and Park Street Bridges are also set forth as follows:

Fiscal Year	Fruitvale Avenue Bridge	High Street Bridge	Park Street Bridge
1913-14	\$ 1,937.84	\$ 1,875.48	\$ 2,891.21
1914-15	11,842.51	14,146.76	9,684.14
1915-16	3,078.39	2,344.54	4,078.73
1916-17	4,072.45	3,953.74	2,840.85
1917-18	5,075.85	2,826.06	6,224.64
1918-19	6,949.80	6,652.10	10,153.72
1919-20	7,812.75	9,769.53	10,357.54
1920-21	18,465.73	6,103.83	9,167.29
1921-22	6,671.50	6,884.75	13,644.52
1922-23	7,215.71	6,795.90	13,503.47
1923-24	6,331.12	14,406.92	8,048.20
[154]			
1924-25	7,558.69	9,940.27	7,466.12
1925-26	10,037.87	6,832.69	9,972.74
1926-27	8,322.69	7,485.69	7,856.16
1927-28	7,751.94	9,690.75	13,502.22
1928-29	9,888.50	10,965.56	21,003.10
1929-30	12,797.87	22,319.42	10,116.56
1930-31	29,738.53	13,150.33	12,766.64
1931-32	13,840.17	11,472.59	15,079.37
1932-33	10,130.60	9,668.81	11,888.35
1933-34	11,398.59	14,379.24	
1934-35	13,168.07	11,193.94	
1935-36	11,332.04	11,193.42	
1936-37	12,005.73	11,923.38	
1937-38	12,663.73	14,695.79	
1938-39	12,059.52		
Total.....	\$262,148.19	\$240,672.69	\$200,245.57

The total cost paid by the County of Alameda for maintaining and operating said Bridges for the periods of time hereinabove set forth was \$703,-066.45.

Subsequent to the end of the fiscal year 1938-39 the average cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge has been approximately One Thousand Dollars (\$1,000.00) per month, and the cost of replacing this Bridge is estimated to be approximately One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00).

The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto, and the expenditure was not assented to by two-thirds [155] of the qualified electors of the County of Alameda voting at an election held for that purpose.

In the fiscal year 1913-14, and in each fiscal year thereafter, the income and revenue provided by the County of Alameda for each such fiscal year was sufficient to pay for the maintenance and operation of said Fruitvale Avenue Bridge for each such one (1) fiscal year.

In the fiscal year 1913-14, and in each fiscal year thereafter, prior to the respective fiscal year of the commencement of the reconstruction of the High Street and Park Street Bridges, the income and revenue provided by the County of Alameda for

each such fiscal year was also sufficient to pay for the maintenance and operation of said High Street and Park Street Bridges for each such one (1) fiscal year.

XVI.

The Fruitvale Avenue Bridge is a combination railroad, vehicular and pedestrian swing span draw-bridge, built upon a single concrete center pier, and has been operated and repaired since November 17, 1913, at the expense of the County of Alameda as hereinabove alleged.

The tracks and right of way of the Central Pacific Railway Company and its lessee the Southern Pacific Company are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge as constructed, and said tracks and right of way are, and since the said construction were used by the Central Pacific Railway Company and its lessee the Southern Pacific Company for the transit of both freight and interurban passenger trains over said Fruitvale Avenue Bridge. Both the Central Pacific Railway Company and the Southern Pacific Company are and were at all times private corporations. The Central Pacific Railroad Company was at all times a private corporation.

[156]

XVII.

The City of Oakland is on the mainland side of San Francisco Bay. Said city is, and prior to 1909, was, the terminal of all transcontinental railroads in central and northern California. Subsequent to

the construction of the Park Street, High Street and Fruitvale Avenue Bridges, the population of the cities of Oakland and Alameda increased steadily and substantially as hereinafter set forth. Industry, shipping and commerce, both interstate and with foreign countries, as well as intrastate, increased proportionately in said cities. Traffic connected with said intrastate, interstate and foreign commerce likewise increased upon the waters described in paragraph IV hereof, including the waters of the Tidal Canal. Traffic upon the three bridges spanning said Tidal Canal also increased.

The Fruitvale Avenue Bridge connects residential and industrial sections of the City of Alameda with similar sections of the City of Oakland via Fruitvale Avenue, which Avenue is also a principal thoroughfare cutting through all the main traffic arteries between the Tidal Canal and the countryside. The Fruitvale Avenue Bridge carries the only rail connection both freight and interurban passenger traffic between the mainland and the City of Alameda, which is entirely surrounded by water.

The population of the County of Alameda according to the official census of the United States from 1890 to 1930, both years inclusive, is as follows:

Year	Population
1890	93,864
1900	130,197
1910	246,131
1920	344,177
1930	474,883

The respective populations of the City of Alameda and the City of Oakland, which two cities are separated by the Tidal Canal, according to the official census of the United States from 1880 to 1930, both years inclusive, is as follows:

City of Alameda

Year	Population
1880	5,708
1890	11,165
1900	16,464
1910	23,383
1920	28,806
1930	35,033

City of Oakland

Year	Population
1880	34,555
1890	48,682
1900	66,960
1910	150,174
1920	216,261
1930	284,063

XVIII.

On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460, hereinafter referred to. A full and true copy of said notice is hereto attached and marked Exhibit 6 and thus by reference is incorporated herein and made a part hereof. Said County has

since agreed to operate said Bridge until March 31, 1940, but in so doing it has [158] waived no rights, has expressly retained all rights it may have in the premises, and the position of the County of Alameda in this suit is not to be prejudiced in any way by such operation. In the event that said County subsequently agrees to operate said Bridge until a time after March 31, 1940, or extends said period from time to time, it will waive no rights, will expressly retain all rights it may have in the premises, and the position of the County of Alameda in this suit is not to be prejudiced in any way by such operation or by such extension or extensions of time.

XIX.

Thereafter, on July 27, 1939, the Central Pacific Railway Company and the Southern Pacific Company served notice upon the plaintiff herein requesting that the plaintiff comply with the Decree in the case of *United States v. Crooks*, and others, hereinabove referred to, and cause the Fruitvale Avenue Bridge to be inspected, maintained and renewed. A full and true copy of said notice is hereto attached and marked Exhibit 7 and thus by reference is incorporated herein and made a part hereof.

XX.

The decision of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460, held the alleged license agreement now before this Court to be void. The "Petition for Writ of Mandate" was filed originally in the Supreme Court of the State

of California on November 25, 1938. On November 28, 1938, said Supreme Court transferred the above entitled matter to the District Court of Appeal of the Third Appellate District of the State of California for hearing and determination. The decision was duly entered on April 12, 1939. On May 19, 1939, a Petition to the Supreme Court of the State of California for hearing after said decision was filed in said Supreme Court. Said application to have the cause heard in the Supreme Court after said judgment was denied by the Supreme Court on June [159] 1, 1939. The Court, in the said case of *County of Alameda v. Ross*, *supra*, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909. The United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of said "Petition for Writ of Mandate" in said action. Copies of all papers filed in said action by both petitioner and respondent, including the stipulation of facts and all briefs, were sent to and received by the United States Attorney in San Francisco during the proceedings and before the case was submitted.

Dated: March 21, 1940.

FRANK J. HENNESSY,

United States Attorney

W. E. LICKING,

Assistant United States Attorney

BRICE TOOLE,

Attorney, Department of Justice

Attorneys for Plaintiff

E. J. FOULDS,

Attorney for Defendants, Southern Pacific Company and Central Pacific Railway Company.

[160]

RALPH E. HOYT,

District Attorney for the County of Alameda, State of California

By J. F. COAKLEY,

Chief Assistant District Attorney for the County of Alameda, State of California

ROBERT H. McCREARY,

Deputy District Attorney for the County of Alameda, State of California

Attorneys for Defendant, County of Alameda. [161]

EXHIBIT 1 (a)

COMPLAINT

in

United States v. Crooks, et al. [162]

In the District Court of the Third Judicial District
of the State of California,
In and for the County of Alameda.

THE UNITED STATES,

Plaintiff,

vs.

M. CROOKS, J. D. FARWELL, R. SIMSON, H. GIBBONS, Alameda County, A. A. Cohen, Central Pacific Railroad Company, P. Sather, J. M. Valdez & W. H. Glascock, G. G. Briggs, A. Ford, Charles Meinicke, M. Klinkofstrom, C. H. Strybing, H. Hansmann, Charles Baum, Gottlieb Muecke, H. A. Gildemeister, Edmund Janssen and Frederick Roeding, T. A. Smith, Oakland Water Front Company, B. S. Alexander, B. S. Brooks, Caroline E. Chipman, Eli Corwin, John Sroufe, C. H. Bradley, H. W. Carpentier, O. Eldridge, Mary A. Fitch, E. Forge, J. C. Hayes and John Caperton, J. G. Kellogg, Annis Merrill, G. H. Mendell, E. B. Mastick, Nathan Porter, Mrs. Julia Page, C. S. Stewart, H. M. Whitney, Defendants.

The United States, the plaintiff herein, by its attorney, Walter Van Dyke, brings this action

against said defendants, and for cause respectfully shows:

That the Central Pacific Railroad Company, and the Oakland Water Front Company are severally corporations formed and created by and in pursuance of law.

That the defendants are the owners and claimants of a certain tract or strip of land lying between the San Leandro and San Antonio estuaries, in said County and State, delineated on the survey and maps attached to this complaint, within the blue lines, and more particularly bounded and described as follows: to wit: [163]

Area required, 88 66-100 acres, a little more or less.

That the United States of America is duly authorized and empowered to improve Oakland Harbor, in said County and State, in the interest of commerce, and for that purpose it becomes and is necessary to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, which forms said Oakland Harbor, for the purpose of removing the sediment from the same, and thereby increasing the depth of water, and improving said Oakland Harbor.

That to make and excavate said tidal canal for the flow of the tides into the head of San Antonio estuary—said Oakland Harbor—as proposed, it becomes and is necessary to have and use the tract

or strip of land above described, over and across which to make and excavate the said canal.

That this proceeding is instituted for the purpose of condemning said tract and strip of land for the use aforesaid; that the taking of said land is for a public use, authorized by law, and by the Government of the United States.

That the following is a description of each piece of land sought to be taken for the public purpose and use aforesaid, and showing whether the same includes the whole or only a part of an entire parcel or tract, to wit: [170]

Wherefore, the plaintiff prays that the said parcel, piece or strip of land, first above described, (and delineated on said map and surveys, within the blue lines,) be condemned, and the title thereto, in fee simple, be vested in the United States, for the public uses and purposes aforesaid.

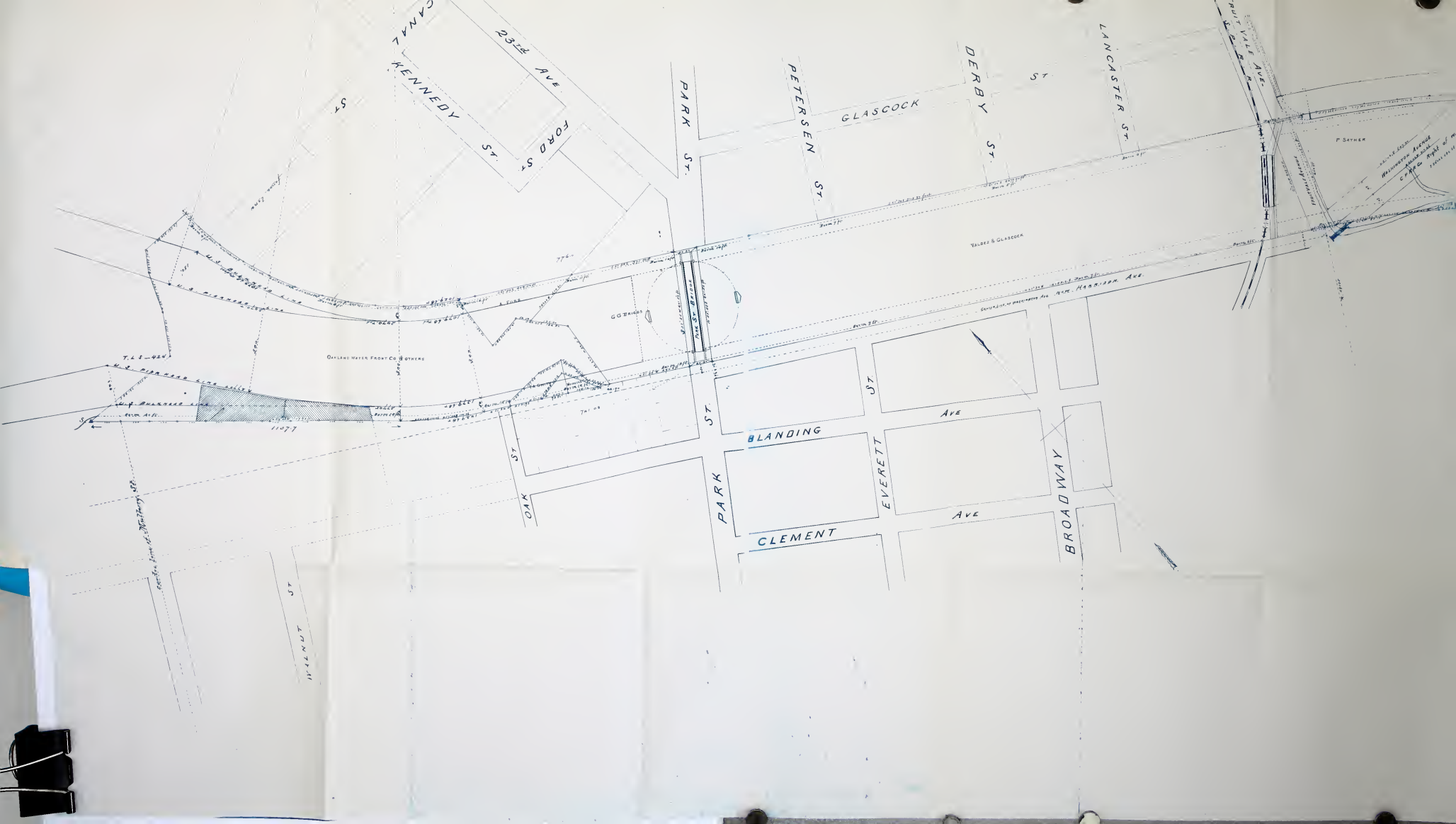
(Signed) WALTER VAN DYKE

U S Atty [187]

EXHIBIT 1 (b)

Map of Tidal Canal (This map, prepared by United States Army Engineers Office in 1882, is attached in lieu of maps and surveys referred to in the Complaint in United States v. Crooks).

[188]



MAP
showing Land owned by the
UNITED STATES
in
ALAMEDA COUNTY, CAL.,
between the Cities of
OAKLAND and ALAMEDA.

Contains 86,433 Acres, acquired by
the United States in September,
1882, by condemnation proceedings
in State Court; Cost of land,
\$39,640; used as Tidal Canal
for improvement of Oakland Harbor,
Cal.

Scale 1" = 1/2 mi.



EXHIBIT 1 (c)

Opinion and Decision in United States v.
Crooks, et al. [190]

In the Superior Court of the County of Alameda,
State of California

THE UNITED STATES

vs.

M. CROOKS et al.

The question of the right of Plaintiff to maintain this action having been raised by some of the defendants and heretofore submitted to and decided by this Court in favor of such right it only remains to determine the damages and compensation to be paid to the several defendants for the land proposed to be taken from each and the improvements thereon and such damages as will result to the owner of land by segregating a part from the larger parcel. The rule by which the Court is to be governed is laid down in the Code of Civil procedure of this State, as follows:

Section 1248. The Court must hear testimony and thereupon must ASCERTAIN and ASSESS.

1st. The value of the property sought to be condemned and all improvements THEREON pertaining to the REALTY etc.

2nd. If the value of the property sought to be condemned constitutes only a PART of a larger PARCEL, the damages which will accrue to the

portion NOT sought to be condemned by reason of ITS SEVERANCE from the portion sought to be condemned, and the Construction of the improvement in the manner proposed by the Plaintiff.

3d. How much the portion NOT sought to be condemned will be benefited if at all by the construction of the improvement proposed by the Plaintiff and if the benefits be equal to the damages assessed under Subdivision TWO the owner of the parcel shall be allowed no compensation except the value of the PORTION taken. [191]

Section 1249. For the purpose of assessing compensation and damages the right thereto shall be deemed to have accrued at the DATE of the summons, and its ACTUAL value at that DATE shall be the measure of compensation for all property ACTUALLY TAKEN and the basis of damages to property NOT actually taken but INJURIOUSLY AFFECTED in all cases where such damages are allowed under Section 1248.

The Summons in this case bears date March 4th 1876, that is therefore the date at which values and damages are to be ascertained and assessed.

The only claim for damages other than compensation for the value of the land sought to be condemned under subdivision two was and is made on the part of one of the defendants and on the following ground to wit: 1st, it would deprive this defendant of the benefit of certain gravel which in the rainy season is deposited on his land through a small creek running through a portion of it and of

the water which stays in said creek for several months in the year and serves to water stock, second because the proposed canal would cut off defendants land from the mainland of the county and the portion not taken would in consequence thereof be greatly depreciated in value by reason of such severance of communication with the main land, and because it would have the effect of leaving defendants land together with the whole Town of Alameda surrounded by water.

Upon these propositions or claims for damage testimony was given tending to show great depreciation in value of the portion of the tract not condemned, but all such damages (except as to the gravel deposits and water) are common to all the lands southerly of the proposed canal and do not particularly or exclusively injuriously affect defendants land more than it affects all other lands on the same side of the canal, and not only so but [192] if such damages accrue at all it is not by reason of the severance of the portion proposed to be condemned from the larger parcel not proposed to be condemned but is in consequence of the construction of the canal itself in that vicinity. There was no improvements pertaining to the realty upon the portion sought to be condemned except that it would necessitate the removal of a few rods of fencing. Damages for which removal were waived by defendant, and the property of defendant in other respects remains after the construction of the Canal for all purposes for which it has been or is now used as if no such Canal was constructed.

For these considerations it is not deemed that such damages are allowable under the code.

The theory of the construction of this canal is that it is a necessary part of the plan for the improvement of Oakland Harbor for the benefit of Commerce, and in such cases individual rights and claims to the soil and prospective values or use of land are subordinate to the public necessity. Only that such actual compensation and damages shall be allowed as will compensate for the property taken and any special damages that may result directly by reason of the severance of a portion from a larger tract.

As to damages to be allowed or claimed upon the assumption that the construction of the canal as proposed will deprive the defendant of certain deposits of gravel annually accumulating during the rainy seasons, and the water which remains for the use of stock a portion of the year. It is not clear to the court as to the legal right of defendant to any claim therefor and in view of the fact that precisely the same consequences would result, if the canal were constructed a hundred yards or more northerly from the northerly line of defendants land without taking any of it and that such damage do not arise from the taking of any part of defendants land but solely from the nature of the [193] construction of the canal and also in view of the fact that the damages are to be estimated as far back as 1876 and that defendant has not as yet suffered any such damage, and in further con-

sideration that it does not follow that because large quantities of gravel have hitherto been annually deposited upon defendants land that such results would continue for any given or indefinite time, or that if continued it would be a source of profit. And also because of such damages being consequential remote and uncertain of just estimation it is deemed that they are not such damages as are embraced in the damages contemplated by the code.

As the law requires the benefits to be estimated to compensate for damages, other than for the land taken, and in this case no such damages being allowed no necessity arises for assessing the benefits that may flow from the improvement. Indeed aside from the value of the land taken should hold from the testimony that any damage by depreciation of values that might result from the construction of the canal is compensated by the benefits that may reasonably be expected from the improvement proposed.

This leaves for determination the sole question of the compensation to be allowed to the several defendants for the land proposed to be taken or the actual value of each parcel on March 4th, 1876.

Upon this question of values numerous witnesses have testified some of whom are claimed to be experts by reason of having been engaged for a series of years in the buying and selling of real estate both in San Francisco City and County and Alameda County and in and about the land in question others old residents in the neighborhood of the

lands proposed to be taken who claim to be able to determine the values by reason of long residence in the vicinity of and familiarity with the lands proposed to be condemned, and in addition the County Assessors of Brooklyn Township and Alameda [194] Township wherein said lands are located who have for years before and since the 4th of March 1876 assessed the identical lands in question being required by law to fix thereon a cash valuation.

The testimony of these several witnesses as to the values of these lands in 1876 range from \$10 to \$750 per acre for the Marsh lands, and from \$300 to \$1250 per acre for the up lands (so-called). It is manifest that these estimates are largely based upon prospective and not upon actual values for according to the testimony of one of the witnesses no land is worth to exceed \$250 for production uses. It follows that the basis of the estimates of values of the lands proposed to be taken by the several witnesses not being founded upon the productive capabilities of the soil nor upon actual transactions of sales or offers to purchase must to a large extent be founded upon their location as being in the vicinity of the Towns of Alameda and Oakland and consequently at some time required for residences or business purposes depending upon the growth of said Towns this would give them an actual commercial value as an investment larger or smaller according to the faith of the witness or purchaser in the growth of the Towns.

It will be perceived that a satisfactory estimate of values under such testimony is not free from difficulty but the court has decided to allow as compensation to the owners and claimants of the several tracts of land proposed to be taken the amounts set forth in the Schedule hereto.

[195]

Schedule			
No.	Names of Claimants	Character of lands	Values
Acres			Assessed
			\$ cts
5.48	M Crooks	mudflats & tidelands.....	274.00
3.18	Mrs. E. Farwell	marshland	795.00
6.21	R Simpson	marshland	1,242.00
10.26	H Gibbons	pt up or high. prt marsh.....	3,000.00
2.72	A A Cohen	Upland	2,176.00
14.47	P. Sather	pt marsh bal up.....	9,405.00
19.58	Glascoek & Valdez	all upland	15,664.00
3.64	G G Briggs	pt marsh	2,548.00
—			
.89	Ford	Upland	712.00
15.72	Oakland Water front Co.	marshland	3,880.00
			<hr/>
			\$39,696.00
.82	Central Pacific RR Co.	Road bed no claim for damages	
1.70	Fruit Vale & Washington Avenue	Road bed	no claim
74	Park Avenue		no claim
34	T A Smith		no claim
16	C Menke		do

Whole amount of land proposed to be taken for the construction of the canal 86 66/100 acres. including the roadways which amount in the aggregate to 3 89/100 acres leaving the quantity of land to be paid for of various grades 82 77/100 acres.

The Government will erect suitable bridges on all crossings upon the road now leading out of the

Town of Alameda that are crossed by the canal and pay the costs of this action. The Plaintiff will prepare findings and a decree in accordance with this opinion.

August 31st, 1882.

N. HAMILTON,

Judge [196]

EXHIBIT 1 (d)

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

in

United States v. Crooks, et al. [197]

In the Superior Court of the County of Alameda,
State of California

No. 3590 in late 3rd District Court

THE UNITED STATES,

Plaintiff,

vs.

M. CROOKS et al.,

Defendants.

This cause came on for trial on the 7th day of December, 1881. Before the trial, in consequence of the death or transfer of interest of some of the original defendants the representatives or successors in interest of such defendants respectively were thereupon, on motion and by consent of the

respective parties, substituted in place of the said former defendants, deceased, or who had transferred their interest, to wit:

Susan Crooks, in place of M. Crooks, deceased; Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander and Marion Alexander in place of B. S. Alexander, deceased;

Defendant Charles Meinicke in place of M. Klinkofstrom, C. H. Strybing, H. Hansmann, Charles Baum, Gottlieb Muecke, H. A. Gildemeister, Edmund Janssen and Frederick Roeding, whose interests were transferred to said Meinicke;

A. E. Davis in place of Caroline E. Chipman, E. Forge, J. C. Hayes, Annis Merrill, Mary A. Fitch, Thadeus S. Fitch, S. A. Chapin, C. C. Stevenson, Nathan Porter, Wm. McAfee and James Spiers whose interests were transferred to said Davis. Defendant H. W. Carpentier in place of John Sroufe, C. H. Bradley, Eli Corwin and H. M. Whitney, whose interests were transferred to defendant Carpentier;

And the said several parties by their Attorneys in [198] open court, expressly waived a jury and consented and agreed to a trial by the Court sitting without a jury.

The trial thereupon proceeded before the Court sitting without a jury, and was continued from time to time, a large number of witnesses being produced and examined by their respective parties and documentary and written testimony introduced. And thereafter the case was argued by counsel for

the respective parties, and on the 1st day of June 1882, was finally submitted to the Court for its decision.

And now having fully considered the case the Court finds and renders its decision as follows, to-wit:

That the plaintiff, the United States of America, is duly authorized and empowered to improve Oakland Harbor in the said County of Alameda, State of California, in the interest of commerce, and said Harbor is a public navigable Harbor; and that to carry out the improvement of said Oakland Harbor, it is necessary to turn the water from San Leandro Bay or Estuary into and through San Antonio Estuary, which latter forms Oakland Harbor, for the purpose of removing the sediment from the same thereby increasing the depth of water in said Harbor. That to turn the tide water from San Leandro Bay to the head of Oakland Harbor it is necessary to cut a canal through the low neck of land lying between the two bays or Estuaries.

That for a canal to answer the purpose contemplated it will require the strip of land mentioned in the complaint and delineated on the map of survey, attached to said complaint and hereafter described, and that it is necessary to take said strip of land over and across which to make and excavate said canal.

That the use for which said strip of land is to be taken, towit, said tidal canal, is a public use authorized by law and by the government of the

United States; that such taking [199] is necessary to such use.

That the location of said proposed canal, as hereinafter particularly described, has been made in the manner which will be most compatible with the greatest public good and will do the least private injury.

That the public use herein mentioned is a more necessary public use than that to which any portion of said strip of land has already been appropriated.

That the said strip of land to be taken is more particularly bounded and described as follows, to-wit: [200]

That said property so sought to be condemned is of the value of \$39,696.00.

That said tract or strip of land sought to be condemned consists of different parcels owned and claimed by different parties, to-wit: said defendants severally; and the value of each of said different parcels and each estate and interest therein separately assessed, are as follows, to-wit: [206]

That G. W. Dent a defendant herein filed an Answer setting up some claim to the Marsh land in controversey which claim to said and other Marsh lands has been adjudicated in this Court as to said title to said Marsh land and the claim of said Dent thereto, and the title and claim of said Dent thereto was by said Court decided to be invalid.

There are no damages to the property sought to be condemned by reason of its severance from the portion sought to be condemned and the construc-

tion and the improvement in the manner proposed by the plaintiff.

That it is necessary to construct and keep in repair good and sufficient bridges across said canal and all the public roads and railroads now leading from the town of Alameda across the line of said proposed canal and all roads now used as public highways whether so declared or not.

CONCLUSIONS OF LAW

From the foregoing facts the Court finds as a conclusion of law that the plaintiff is entitled to a judgment and decree condemning said tract or strip of land herein first described for the public use aforesaid upon paying the amount of damages herein assessed to the parties entitled thereto, respectively, or their attorneys, or by paying the aggregate sum assessed as damages into this Court for said respective parties.

That in the construction of said canal the plaintiff at its own cost, construct and keep in repair suitable bridges, across the same on all the Public highways and railroads now crossing the line of said canal and all roads now used as public highways whether so declared or not and It Is So Ordered.

N. HAMILTON,
Judge. [225]

EXHIBIT 1 (e)

Decree in United States v. Crooks, et al. [226]

In the Superior Court of the County of Alameda,
State of California

No 3590 in the late 3rd District Court

The United States,

Plaintiff,

v.

Susan Crooks, Executrix of the last Will and Testament of M. Crooks, deceased, J. D. Farwell, Mrs. E. Farwell, R. Simson, H. Gibbons, Alameda County, A. A. Cohen, Central Pacific Railroad Company, P. Sather, J. M. Valdez and W. H. Glascock, G. G. Briggs, A. Ford, Charles Meinicke, T. A. Smith, Oakland Water Front Company, Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander and Marion Alexander, B. S. Brooks, A. E. Davis, H. W. Carpentier, O. Eldridge, John Caperton, J. G. Kellogg, G. H. Mendell, E. B. Mastick, Mrs. Frances E. Page, C. S. Stewart, G. W. Dent, Defendants.

DECREE

This cause came on regularly for trial before the Court, a trial by jury having been expressly waived, and it being stipulated that the same be tried by the Court sitting without a jury, the parties by their respective Attorneys being present in Court and consenting thereto;

It having been suggested to the Court that since the commencement of the action defendant M. Crooks had died, on motion Susan Crooks, Executrix of the last Will and Testament of Mathew Crooks, deceased, was substituted as defendant in place of said M. Crooks, deceased; also that defendant B. S. Alexander had died, and that his estate had been settled, closed and distributed to his heirs Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander, and Marion Alexander, on motion said heirs were substituted as defendants in place of [227] said B. S. Alexander, deceased. It also appearing that defendant Charles Meinicke had since the commencement of the action succeeded to the interest of defendants M. Klinkofstrom, C. H. Stirling, H. Hansman, Charles Baum, Gottlieb Muecke, H. A. Gildemeister, Edmund Janssen, and Frederick Roeding, on motion said defendant Meinicke was substituted as defendant for said other last named defendants. And it further appearing that since the commencement of said action A. E. Davis had succeeded to the interest of defendants Caroline E. Chipman, E. Forge, J. C. Hayes, Annis Merrill, Mary A. Fitch, Thadeus S. Fitch, S. A. Chapin, C. C. Stevens, Wm. McAfee, James Spiers and Nathan Porter, on motion said Davis was substituted as defendant in place of said former defendants Chipman, Forge, Hayes, Merrill, Fitch—M. A. and T. S., —Chapin, Stevens, McAfee, Spiers and Porter. And it further appearing that defendant H. W. Carpenter had since the commencement of said action suc-

ceeded to the interest of defendants John Stroufe, C. H. Bradley, Eli Corwin and H. M. Whitney, on motion said H. W. Carpentier was substituted as defendant for said defendants Stroufe, Bradley, Corwin and Whitney.

Whereupon a large number of witnesses were produced on the part of the plaintiff and the defendants examined, and documentary and written testimony introduced, and the testimony being closed, the cause was argued by the respective counsel and submitted to the Court for consideration and decision; and after due deliberation thereon the Court delivered its findings and decision in writing which were filed herein on the 25th day of September, 1882.

Wherefore by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed that the plaintiff herein have judgment for the condemnation of the tract or [228] strip of land, in the complaint and said findings set forth and herein after described, upon the payment to the defendants of the sums of money respectively found to be due them as damages assessed for the taking of said land, as set forth in said findings or that said plaintiff deposit in Court the aggregate sum so found due the defendants, to wit, the sum of Thirty nine thousand six hundred and ninety six (\$39,696.00) Dollars for the said defendants respectively to be distributed to them according to said findings, towit:

To defendant Susan Crooks, executrix of the last

Will and Testament of M. Crooks, deceased, and substituted as defendant in this proceeding in place of said M. Crooks, deceased, Two Hundred and seventy four (\$274) Dollars;

To defendant Mrs. E. Farwell, Seven hundred and ninety five (795) Dollars;

To defendant R. Simson, Twelve Hundred and forty two (1242) Dollars;

To defendant H. Gibbons Three thousand (3000) Dollars;

To defendant A. A. Cohen, Two thousand one hundred and seventy six (2176) Dollars;

To defendant P. Sather, Nine thousand four hundred and five (9405) Dollars;

To defendants J. M. Valdez and W. H. Glascock Fifteen thousand six hundred and sixty four (15664) Dollars;

To defendant G. G. Briggs Two thousand five hundred and forty eight (2548) Dollars;

To defendant A. Ford seven hundred and twelve (712) Dollars;

To defendants Oakland Water Front Company, Louisa F. Taylor, Anna N. Alexander, Walter Stone Alexander, Marion Alexander, B. S. Brooks, A. E. Davis, H. W. Carpentier, [229] O. Eldridge, John Caperton, J. G. Kellogg, G. H. Mendell, E. B. Mastick, Mrs. Frances E. Page and C. S. Stewart, Three thousand Eight hundred and Eighty (3880) Dollars;

Defendants the County of Alameda, the Central Pacific Railroad Company, Charles Meinicke and

T. A. Smith—not having claimed damages, no damages are awarded to them.

It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all roads now used as public highways, crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the line of said canal.

The description and particular boundaries of said parcel or strip of land hereby ordered to be condemned for the public use and purpose of said tidal canal are as follows towit: [230]

N. HAMILTON,



Judge [236]

EXHIBIT 2

Map of Tidal Canal as of 1909 [237]



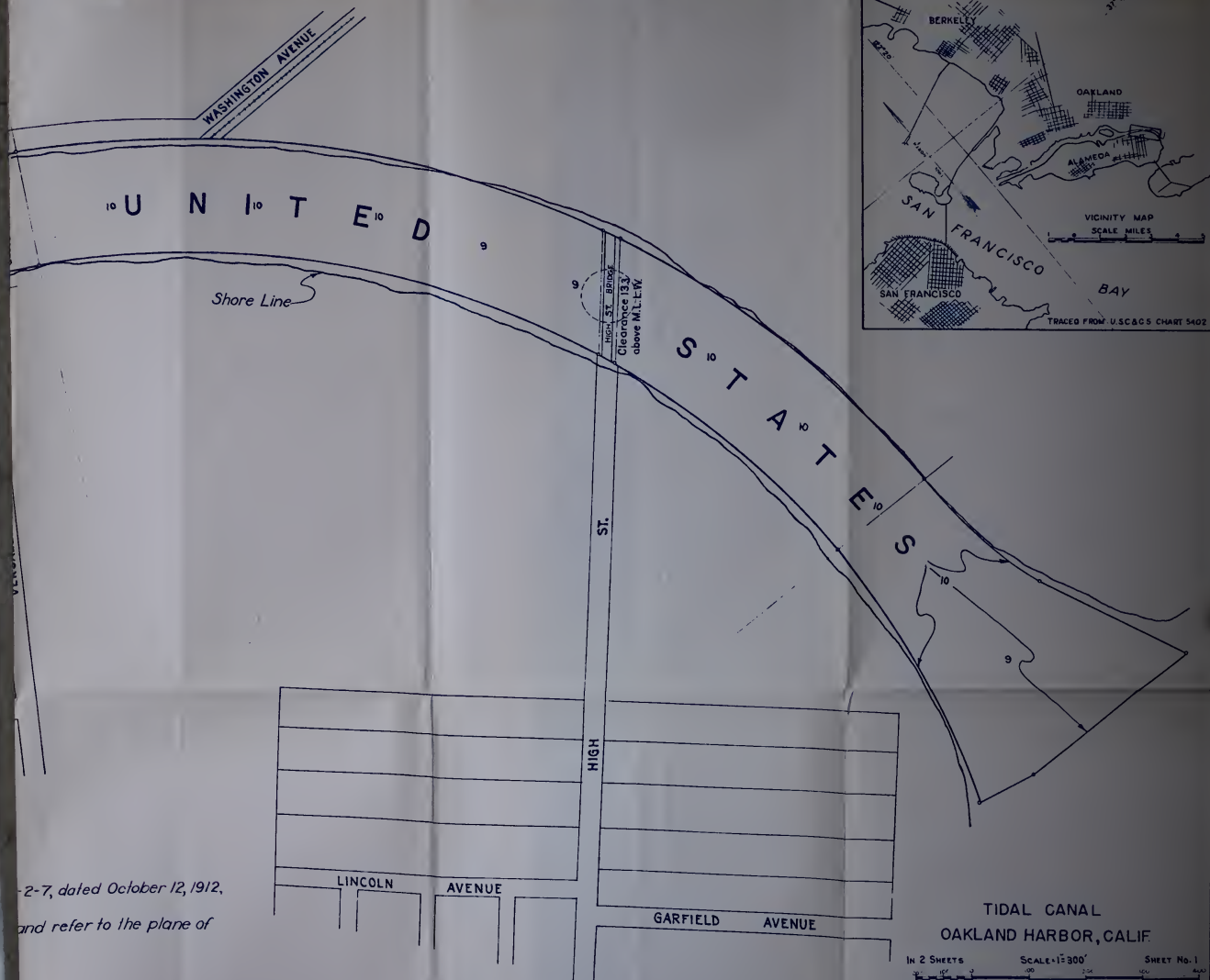
LEGEND:

Shore line shown thus 
 Property line shown thus 

Note:

Traced from map No. 2-2-7, dated October 12, 1912,
 U.S. Engineers Office.

Soundings are in feet and refer to the plane of
 mean lower low water.



TIDAL CANAL OAKLAND HARBOR, CALIF.

IN 2 SHEETS SCALE 1"=300' SHEET No. 1

U.S. Engineer Office, San Francisco, California, March 4, 1940

Submitted: Approval Recommended: Approved:

Asst. Engineer Senior Engineer Major, Corps of Engs. U.S.A.

Drawn By: D10 Traced By: b10 Checked By: CAR

DEC. FILE PILE DIV. SHEET

2 1 90

-2-7, dated October 12, 1912,
and refer to the plane of

EXHIBIT 3

RESOLUTION OF BOARD OF SUPERVISORS
OF ALAMEDA COUNTY

December 6, 1909 [239]

RESOLUTION OF THE BOARD OF SUPER-
VISORS OF THE COUNTY OF ALAMEDA,
STATE OF CALIFORNIA, ACCEPTING
PARK STREET, FRUITVALE AVENUE
AND HIGH STREET BRIDGES.

Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

Whereas, that portion of said canal between said bridges has never been open to navigation; and

Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Dis-

tricts, has recommended that the bridges hereinbefore referred to, to-wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and,

Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and,

Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed [240] to supply electric power for the operation of said bridges hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to-wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of

them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant Colonel John Biddle, and to the City Clerk of the City of Alameda.

Passed and adopted by the following vote:

Ayes: Supervisors Bridge, Foss, Mullins and Ch. Honrner 4.

Noes: Supervisors None.

Absent: Supervisor Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,

County Clerk and Ex-officio
Clerk of the Board of Super-
visors of Alameda County,
Cal.

By H. M. WILSON,

Deputy Clerk. [241]

EXHIBIT 4

LICENSE

September 3, 1910 [242]

J. A. G. O.

(27215)

Whereas, By the Act of Congress approved June 25, 1910, entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes" (Public—No. 264), and under the clause of appropriation therein for "Improving harbor at Oakland, California", it is provided, *inter alia*, as follows:

"Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer";

Now, Therefore, Under the authority and discretion in him vested by the above-quoted provision

of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, a license, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This License is granted subject to the following conditions and provisions:

1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together [243] with the necessary cables and wiring; furnishing bridge-tenders'

houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5.—That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

Witness my hand this 3rd day of September, 1910.

(Signed) JOHN C. SCOFIELD

Assistant and Chief Clerk
For the Secretary of War,
in his absence [244]

EXHIBIT 5

RESOLUTION OF BOARD OF SUPERVISORS OF ALAMEDA COUNTY

November 10, 1913 [245]

Introduced by Supervisor.....

At meeting held Nov. 10, 1913.

Whereas, this Board of Supervisors, by resolution heretofore adopted, agreed to accept certain

draw bridges across the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

Whereas, subsequent to the adoption of said resolution, and on the 3rd day of September, 1910, the Secretary of War, in accordance with the provisions of an Act of Congress, approved June 28, 1910, entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes" (public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the said three bridges built by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and provisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic

corporation, and in case two or more such lines or corporations shall desire to use the bridges, of any of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

[246]

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and

Whereas, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be it resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said acceptance effective from and after Monday, November 17th, 1913.

Adopted by the following vote:

Ayes: Supervisors Bridge, Foss, Kelley, Murphy and Chairman Mullins—5.

Noes: Supervisors None.

Absent: Supervisors None. [247]

I, John P. Cook, County Clerk, and ex officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State

of California, on Monday, November 10, A. D., 1913.

JOHN P. COOK,

County Clerk and ex-officio
Clerk of the Board of Supervisors of Alameda County, State of California.

By H. M. WILSON,

Deputy Clerk. [248]

EXHIBIT 6

NOTICE OF SEPTEMBER 28, 1939 FROM
COUNTY OF ALAMEDA TO UNITED
STATES [249]

EXHIBIT 6

County of Alameda

September 28, 1939.

R. C. Hunter

Major, C. E.

District Engineer

In re: The Fruitvale Avenue Bridge and the decision in County of Alameda v. Ross, 97 Cal. App. 166, petition for hearing denied by the Supreme Court of the State of California.

Dear Sir:

As stated in our letter addressed to J. A. Dorst, Lt. Col. C. E. on June 30, 1939, the above decision

holds that the license agreement under which the County is operating the Fruitvale Avenue Bridge is void.

The Board of Supervisors of the County of Alameda has felt that the United States Government should be given a reasonable length of time within which to meet the situation created by this decision. In view of the above mentioned decision, the County cannot continue to operate the Fruitvale Avenue Bridge indefinitely. The Board of Supervisors has accordingly directed me to notify you that at midnight, December 31, 1939, the County of Alameda will cease to operate said bridge.

Respectfully yours

G. E. WADE

County Clerk and Ex-Officio
Clerk of the Board of Supervisors of the County of Alameda, State of California

By J. C. HOLLAND

Deputy [250]

EXHIBIT 7

NOTICE OF JULY 27, 1939
FROM
CENTRAL PACIFIC RAILWAY COMPANY
AND SOUTHERN PACIFIC COMPANY
TO
UNITED STATES [251]

Southern Pacific Company
65 Market St., San Francisco

File: G-4179-2
July 27, 1939.

District Engineer,
U. S. War Department,
Custom House,
San Francisco, Calif.

Dear Sir:

The attention of your office has several times been called to the situation of the so-called Fruitvale Avenue Drawbridge between Oakland and Alameda. I call your attention particularly to a formal notice under date of November 26, 1937, signed on behalf of the Central Pacific Railway Company and Southern Pacific Company delivered to your office on December 17, 1937.

We have recently been informed by representatives of the County of Alameda that the County will no longer maintain or operate the drawbridge referred to. This decision on the part of the County appears to be due in large part at least,

to a decision of the District Court of Appeal, Third District of California, under date of April 12, 1939, in proceeding No. 6184—County of Alameda vs Ross, to the effect that the license or agreement which purported to place this drawbridge under the jurisdiction of the County was void, at least so far as the County was concerned, and that the County could not lawfully expend moneys on the bridge.

The railroad portion of this drawbridge is an important artery of commerce, forming the only all-rail connection to the City of Alameda and it is essential that proper steps be taken to renew the bridge within a reasonable time. The Central Pacific Railway Company, successor to Central Pacific Railroad Company, and Southern Pacific Company, its lessee, therefore renew their demand that the U. S. Government comply with the decree in the case of the United States vs Crooks, and others, being case No. 3590, which decree was entered November 4, 1882 and is on file in the office of the County Clerk of Alameda County, Calif. Said decree provides, among other things:

“* * * that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same * * * and also suitable railroad bridges on the present railroad tracks crossing the line of said canal.”

You are therefore again called upon to cause this drawbridge to be inspected, maintained and re-

viewed, so that the public service of said bridge will not be interrupted.

CENTRAL PACIFIC RAILWAY
COMPANY
SOUTHERN PACIFIC
COMPANY

By E. J. FOULDS
Their Attorney

[Endorsed]: Filed March 21, 1940. [252]

[Title of District Court and Cause.]

STIPULATION OF FACTS WITH REFER-
ENCE TO OFFER OF EVIDENCE BY DE-
FENDANT, COUNTY OF ALAMEDA,
SUBJECT TO OBJECTION OF PLAIN-
TIF AS TO MATERIALITY

It is hereby stipulated by and between the parties hereto by their respective attorneys, that the following facts are true, subject to objection by plaintiff, United States, as to materiality:

I.

That Major G. H. Mendell, Major of Engineers of the United States Army, was a witness for the United States Government in the case of United States vs. Crooks, et al, and testified with reference to the Report of the Board of Engineers of the United States Army made to Brigadier-General A. A. Humphreys, Chief of Engineers of the United States Army, with reference to San Antonio Creek, dated February 16, 1874; that he testi-

fied also at said trial of United [253] States vs. Crooks, et al, as to the plans and purposes of the construction of the Tidal Canal for which the land described in the Complaint in said action was to be condemned; that said Major G. H. Mendell was the same party whose name was subscribed to the said report of February 16, 1874, above mentioned, a copy of which is attached to the "Stipulation of Facts with reference to offer of evidence by plaintiff, subject to objection of defendant, County of Alameda, as to materiality", on file in the case at bar.

II.

With the exception of the omission of the Report of the Board of Engineers of the United States Army with reference to San Antonio Creek, San Francisco Bay, California, dated February 16, 1874, the exhibit hereto attached marked Exhibit 1, and by reference incorporated herein, is a true and correct copy and transcription of the testimony of said Major G. H. Mendell. The said Report of February 16, 1874, is omitted from said Exhibit 1 in the interest of brevity and because the same report is attached to Exhibit 1 of a "Stipulation of Facts with reference to offer of evidence by plaintiff, subject to objection of defendant, County of Alameda, as to materiality," on file in the case at bar.

III.

That the proposed dam across the mouth of San Leandro Bay, referred to in said Report, or any

dam in connection with the waters referred to in the Report, was never built.

Dated: March 21, 1940.

FRANK J. HENNESSY,
United States Attorney

W. E. LICKING,
Assistant United States At-
torney

BRICE TOOLE,
Attorney, Department of Jus-
tice,
Attorneys for Plaintiff [254]

E. J. FOULDS,
Attorney for Defendants,
Southern Pacific Company
and Central Pacific Railway
Company.

RALPH E. HOYT,
District Attorney for the
County of Alameda, State of
California,

by J. F. COAKLEY,
Chief Assistant District At-
torney for the County of Ala-
meda, State of California,

ROBERT H. McCREARY,
Deputy District Attorney for
the County of Alameda, State
of California,
Attorneys for Defendant,
County of Alameda.

EXHIBIT 1.

In the Superior Court of the County of Alameda,
State of California.

THE UNITED STATES,

Plaintiff,

vs.

M. CROOKS, et al.,

Defendants.

STATEMENT ON MOTION FOR A NEW
TRIAL ON BEHALF OF DEFENDANT
ALFRED A. COHEN.

This cause came on to be tried in the Superior Court of the County of Alameda, State of California, in Department No. 3 thereof on the 10th day of November A. D. 1881. Walter Van Dyke Esq., appearing for plaintiff and defendant Alfred A. Cohen Esq., for himself and other Defendants in the cause. Whereupon it was expressly stipulated in open court and entered upon the minutes, that a jury be waived and that the action be tried by the Court without a jury.

The following were the proceedings had on said trial.

GEORGE H. MENDELL

was called as a witness on behalf of plaintiff, and testified as follows:

I am an Engineer in the service of the United States, and I have [256] charge of the improvement of Oakland Harbor.

Q. What have been the steps taken by you as engineer with reference to the Oakland Harbor from the beginning?

Mr. Cohen: We object to the question on the ground of irrelevancy, immateriality and incompetency, and not the best evidence. The Court overruled the objection, and defendant then and there duly excepted to the ruling of the Court.

Exception No. 1

Thereupon the witness answered as follows:

The first connection that I had with the subject after 1873, was as a member of the Board of Engineers, which was composed of General Alexander, Colonel Stewart and myself, to whom the Secretary delegated the requirements of the Bill of 1873. That Board under these instructions made surveys with regard to the improvement of this Harbor.

I have not got the order from the Secretary of War. It is a printed order in the usual form. That Board prepared a report which was submitted to General A. A. Humphreys, Chief of Engineers in February 1874. That report has been printed. I have a copy of it, it is dated February 1874. The Board reported to the Chief of Engineers one of the Bureaus of the War Department having charge of the work.

Plaintiff here offered in evidence a printed copy of said report of which the following is a copy:

(This report is not included here because a true and correct copy of the same is attached to "Stipulation of Facts With Reference to

Offer of Evidence by Plaintiff, Subject to Objection of Defendant, County of Alameda, As to Materiality," and reference is hereby made to said copy of said report as included in said Stipulation.)

To the introduction of which report in evidence defendant then and there objected on the ground of its irrelevancy, immateriality and [257] incompetency, but not on the ground of its being simply a copy: which said objection the Court overruled and to such ruling of the Court this defendant then and there duly excepted. Said Report was then marked "Plaintiff's Exhibit A" and read in evidence.

Exception No. 2

The Witness continuing stated that in March 1874, he was in Washington and appeared before a Committee of Congress with reference to this matter—the Committee of Commerce of the House that made recommendations for improvements of harbors. The report was then before this Committee and he was examined by the Committee in reference to it. It was sometime the latter part of March 20th or 25th—General Alexander also appeared with him. The report recommended this canal would say that in reference to that that the canal is one of the essential parts of the project and is set forth in the report. In July 1874, Congress having made an appropriation he was assigned by the War Department to the construction of this work.

Q. Was that under direction of the Secretary of War?

A. Yes sir. I have a letter from the Chief of Engineers assigning me to that department.

Mr. Van Dyke: If you have no objection I will submit that as an original.

Mr. Cohen: I would like to have it appear on the record that all this testimony is taken subject to my objection. But these copies are received with the same force and effect as the originals if produced here.

The Court: Yes Sir.

The foregoing letter was then read in evidence.

The witness then stated that shortly after he was assigned to this work in the next spring he had a survey made of the land lying between the head of San Antonio Creek and San Leandro Bay with a view of getting the location of this land and the metes and bounds. Having [258] obtained that map in the summer of 1875, he then drew out the line of this canal on this map after an examination of the ground. Previous to that time August 13th 1875, he wrote a letter to the department (his own department) in which he called attention to the necessity of acquiring title to this land and asked that the Attorney General be authorized to begin proceedings for that purpose. In reply to that he received a letter which purports to be a letter from the department to the Secretary of War which was furnished by his own department for his information.

Q. Was this endorsement on it? "Office of Chief of Engineers September 3rd 1874, copy respectfully furnished Major G. H. Mendell Corps of Engineers

for his information by command of Brig. Gen'l Humphreys John G. Park Major of Engineers?"

A. It is an indorsement on it. It ought to be 1875. (Witness reading) "Copy respectfully furnished for his information John G. Park Chief of Engineers." That is his signature.

Mr. Van Dyke: This is a copy of a letter to the War Department from the Chief of Engineers. It was endorsed by him and sent to Colonel Mendell for his use.

Witness: It was from the Attorney General to the War Department. It was sent to me as a reply to my letter showing that my recommendations were carried out. It belongs to my files—It was offered as

PLAINTIFF'S EXHIBIT "B"

and the following is a copy—

August 31st, 1875

Department of Justice

Hon. W. W. Belknap,

Secretary of War

Sir.

I have the honor to acknowledge the receipt of a letter from your department dated 28th, inst. requesting instructions to the United States Attorney for California to aid Major Mendell in obtaining the condemnation of certain land required for a part of [259] the canal which is to connect the San Antonio and San Leandro Estuaries in connection with the improvement of Oakland Harbor California. In compliance with your request I have this

day given to Walter Van Dyke Esq., United States Attorney at San Francisco instructions to render the required legal assistance.

Very Respectfully your obedient servant,
S. F. PHILLIPS,
Acting Attorney General.

To the introduction of which letter in evidence defendant then and there objected on the ground of its irrelevancy, immateriality and incompetency, but not on the ground of its being a copy which said objections the Court overruled and defendant then and there duly excepted to such ruling—, and the said letter marked Plaintiff's Exhibit "B" was then read in evidence.

Exception No. 3

Mr. Van Dyke: In this connection I submit a letter of the Attorney General directed to the United States Attorney here in California, I will have this copied and marked and Mr. Cohen agrees to receive it as the original is itself on file.

The paper is marked

PLAINTIFF'S EXHIBIT "C"

and the enclosures are marked

PLAINTIFF'S EXHIBIT "C1"

and

PLAINTIFF'S EXHIBIT "C2"

copies of which are as follows:

Department of Justice.

Washington, August 31st, 1875.

Walter Van Dyke Esq.,

United States Attorney.

San Francisco, California.

Sir.

You will find enclosed herewith copies of letters from General A. A. Humphreys, Chief of Engineers, and from the Acting [260] Chief Clerk of the War Department, in which the request is made that legal assistance be given to Major Mendell in the condemnation of certain land for a part of the canal which is to connect the San Antonio and San Leandro Estuaries in connection with the improvement of Oakland Harbor, California. You are hereby instructed, in accordance with the request, to render the requisite legal advice and assistance.

Very Respectfully,

S. F. PHILLIPS,

Acting Attorney General.

Office of Chief of Engineers,

Washington, D.C. Aug. 26, 1875.

Hon. W. W. Belknap.

Secretary of War.

Sir.

The plan of improvement of Oakland Harbor, California, which is now in process of execution, contains as one of its essential parts, the excavation

of a canal to connect the San Antonio and San Leandro estuaries and inasmuch as legal proceedings will be necessary to secure the title to a part of the land to be occupied by this canal, I beg leave to ask that the Attorney General be requested to instruct the United States District Attorney at San Francisco to aid Major Mendell, Corps of Engineers, in charge of that improvement, in obtaining such land by condemnation.

Very respectfully,
Your obedient servant,
A. A. HUMPHREYS,
Brig. Gen. and Chief of
Engineers. [261]

War Department.
Washington City.

August 28th, 1875.

To the Honorable,
The Attorney General,
Sir:

I have the honor to transmit, herewith, copy of a letter of the 26th inst., from the Chief of Engineers, asking that the United States Attorney at San Francisco be instructed to aid Major Mendell in obtaining by condemnation the land required for a part of the canal which is to connect San Antonio and San Leandro estuaries, in connection with the

improvement of Oakland Harbor, California, and to request that the desired aid may be afforded.

Very respectfully,

Your obedient servant,

WM T. BARNARD,

Acting Chief Clerk

For the Secretary of War,
in his absence.

To the introduction of which letters marked Plaintiff's Exhibit "C", Plaintiff's Exhibit "C1" and Plaintiff's Exhibit "C2" in evidence defendant then and there objected on the ground that they and each of them were irrelevant, immaterial and incompetent but not on the ground of the said Exhibits being copies.—Which said objections the Court overruled and defendant then and there duly excepted. It is admitted that April 1st 1876 the United States Attorney of this State informed the Attorney General that in pursuance of his instructions he had instituted such proceedings in the 3rd Judicial District of this State. [262]

Exception No. 4.

The Witness then stated that he had a survey made of this canal.

Mr. Van Dyke: In your report you stated the necessity of that as part of the improvement?

A. I so regarded it. Yes sir.

Q. What is the use of it?

A. To increase the tidal prism or in more familiar language to increase the tidal water which will pass between the training walls.

The Court: Q. Does that tend to increase the volume of water.

A. Yes Sir: The harbor has been a good deal injured by taking Lake Merritt and segregating that, so that the harbor can receive no benefit from it. For the purpose of restoring this harbor and increasing its depth, it has been thought necessary and I believe it to be necessary to introduce more water than exists in Oakland Harbor. And that can be done by making this connection.

The Witness stated that the length of this canal will be about a mile, 400 feet wide at the top and at the bottom somewhere in the neighborhood of 300 feet, and the depth will be about 8 feet at low water.

That in locating the canal he endeavored to locate the line of it on the least valuable of the country as conformable to the necessary condition to give it the necessary debauché at each of the ends; and in so doing do the least injury to private property.

Q. And you did that?

A. That is my judgment.

Q. Then the lines of this canal—does it carry any improvements—what is the nature of the ground in the line of this canal, is it improved or otherwise?

A. The time I last was there, there was no improvements about as little as any lands about here. It is nearly all marsh land and formerly—there are

evidences of two old sloughs one making from [263] San Leandro Bay and one from San Antonia Creek and probably there was one that connected there; and I followed the course of them as far as I could—I had soundings made to see what the excavations would be.

Q. Mr. Glascock: You propose as I understand to have it 8 feet below low water mark?

A. Yes Sir.

Q. Do you propose it for navigable purposes?

A. Yes Sir.

Q. What would be about the speed of the current.

A. That would be regulated according to the details of the work which we decide on towards the end. The project has never been worked out in all its details—two or three miles an hour.

Cross Examination.

Q. Mr. Cohen: What would be the effect of turning the water of Lake Merritt back into the Estuary of San Antonia as it originally flowed?

A. It would be a benefit to increase the water flow——

Q. Would it not answer the same purpose, of digging this canal?

A. It would tend in the same direction.

Q. Do you think that the land through which this canal is to be constructed would be benefited by the canal?

A. I don't see why it wouldn't be; that is the

adjoining parts of it. That would be my opinion. I am not versed in real estate though.

Q. Are you acquainted with General Alexander?

A. Yes Sir, he is the person named in the Petition here as one of the Defendants, B. S. Alexander.

Q. You spoke of Colonel Stewart is he the person here named C. L. Stewart? [264]

A. Yes Sir:

Q. And George H. Mendell is yourself?

A. Yes Sir and I own five acres of land—I am a co-owner in that land with Mr. Cohen——

Q. Has there been any arrangement made, any authority given you to proceed with this work and take the land and its uses as you claim? Has any arrangement been made for taking the debris from the intercepting streams?

A. We will take care of it sir when we do the work.

Q. Has any arrangement been made for bridging, the cross streets or highways?

A. I don't know what you mean by arrangements. There are no arrangements by way of plans—The report as shown in Exhibit "A" the matter of bridges is alluded to in a way. I would expect to build bridges over all streets when the work was executed.

Q. Take the property in which I am specially interested in which I appear for myself, which is marked on the plan of your canal as property belonging to myself at the junction of Fruitvale Road—you know where that is?

A. Yes Sir—I have been there, It is on that map. If there is any particular point I can refer to it.

Q. Does your plan contemplate—are you authorized by any authority of the United States to build a bridge at the junction of Fruitvale road to connect my land with the main land if the canal is constructed.

A. I have no authority to do it—I have no authority to build that canal, but I should consider it a proper thing to do, and as far as my recommendation went I would have bridges built on the highways——

Q. Would you consider it a proper subject to be considered in assessing the damage done to the property? [265]

A. Yes Sir I suppose so. I don't know what would be a proper subject to consider——

Q. The effect of your Canal would be to leave my property an island?

A. Yes Sir: A very large island.

Q. It would be an island?

A. All of Alameda.

Q. You expect Colonel Mendell to make this a navigable Canal. Do you intend to make the bridges across the canal draw bridges?

A. I suppose so. It would not be navigable without it Sir.

Q. It was admitted that Joseph R. Mauran would testify that the large map, produced properly designated the natural objects on the ground and

correctly showed the areas and boundaries of the several tracts of land——

The Plaintiff then rests—Thereupon defendant moved the Court for an order nonsuiting the plaintiff on the ground—

First. That the United States Government has not authorized the taking of the private property described in and for the uses mentioned in the complaint.

Second. That no authority of law has been shown authorizing the District Attorney of the United States to institute in the name of the United States these proceedings for the condemnation of the lands described in the complaint herein.

The said motion was by the Court denied, and to such ruling, denying said motion defendant then and there duly excepted.

Exception No. 5.

(Thereafter witnesses were called by the defense and plaintiff with reference to the value of the land involved in the suit and with reference to severance damages and damages or benefits as a result of the construction of the improvement.)

[Endorsed]: Filed March 21, 1940. [266]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 22nd day of March, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, ET AL.

Attorneys herein and the parties hereto being present as heretofore the further trial of this case was thereupon resumed. Henry S. Pound was recalled and testified on behalf of the plaintiff. Plaintiff rested. Evan J. Foulds was sworn and testified on behalf of the defendants, Southern Pacific Co., and Central Pacific Railway Co., and said defendants rested. After hearing attorneys, it is Ordered that the motion of the defendant County of Alameda for admission into evidence of stipulation be submitted on briefs to be filed in 5, 2 and 1 days, and that thereafter, upon the Court giving its ruling upon said motion, the issues of the case be

submitted upon briefs to be filed in 2, 10 and 10 days; said time to commence and run from and after date of notice to attorneys of the ruling upon the motion to admit exhibit in evidence. [267]

[Title of District Court and Cause.]

STIPULATION OF FACTS WITH REFERENCE TO OFFER OF EVIDENCE BY DEFENDANT, COUNTY OF ALAMEDA, SUBJECT TO OBJECTION OF PLAINTIFF AS TO MATERIALITY.

It is hereby stipulated by and between the parties hereto by their respective attorneys, that the following facts are true, subject to objection by plaintiff, United States, as to materiality:

I.

That Major G. H. Mendell, also known as George H. Mendell, Major of Engineers of the United States Army, referred to in the "Stipulation of Facts with Reference to Offer of Evidence by Defendant, County of Alameda, Subject to Objection of Plaintiff as to Materiality" on file herein, was deceased prior to the commencement of this proceeding, and, during his lifetime, was the same party named as a defendant in the case of United States vs. Crooks, et [268] al.

Dated: March 25, 1940.

FRANK J. HENNESSY,
United States Attorney

W. E. LICKING,
Assistant United States
Attorney

BRICE TOOLE,
Attorney, Department of
Justice,
Attorneys for Plaintiff

E. J. FOULDS,
Attorneys for Defendants,
Southern Pacific Company
and Central Pacific Railway
Company.

RALPH E. HOYT,
District Attorney for the
County of Alameda, State of
California,

by J. F. COAKLEY,
Chief Assistant District At-
torney for the County of Ala-
meda, State of California

ROBERT H. McCREARY,
Deputy District Attorney for
the County of Alameda, State
of California,
Attorneys for Defendant,
County of Alameda.

[Endorsed]: Lodged March 26, 1940 and motion
to admit in evidence submitted. Harry L. Fouts,
Deputy Clerk. [269]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States Circuit Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 26th day of March, in the year of our Lord one thousand nine hundred and.....

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, ET AL.

Robert H. McCreary, Esq., Deputy District Attorney for the County of Alameda, came into Court and presented a stipulation of facts with reference to offer of evidence by the defendant County of Alameda, and moved that same be filed and admitted in evidence in this case, and it is Ordered that the said motion to admit same in evidence and the objection of William E. Licking, Esq., Assistant U. S. Attorney, to said admission, be and the same are hereby submitted. [270]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 3rd day of April, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

STATE OF CALIFORNIA, Etc.

Upon motion of William E. Licking, Esq., Assistant U. S. Attorney, it appearing that all briefs have been filed, it is Ordered that the motion to introduce certain exhibits into evidence be and the same is hereby submitted. [271]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 10th day of April, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, Etc.

The motion to receive into evidence in this case, the testimony of Major Mendell given in the case of United States vs. Crooks, which was decided by the Superior Court of Alameda County, California in 1882, and numbered 3590, having been heretofore heard and submitted, it is Ordered that the said motion be and the same is hereby denied. [272]

[Title of District Court and Cause.]

NOTICE

To Frank J. Hennessy, Esq.,
U. S. Attorney,
Post Office Building,
San Francisco, California.

Ralph E. Hoyt, Esq.,
District Attorney, Alameda County,
New Court House,
Oakland, California.

E. J. Foulds, Esq.,
Legal Department,
65 Market Street,
San Francisco, California.

You Are Hereby Notified that on April 10th, 1940, Judge Harold Louderback Ordered that the motion to receive into evidence in the above case, testimony of Major Mendell given in the case of U. S. v. Crooks, etc., be and is hereby Denied.

WALTER B. MALING,

Clerk. (a)

San Francisco, California, April 11th, 1940. [273]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 27th day of June, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, et al.

This case came on regularly for argument of the issues herein, the same were argued by attorneys for the parties, and it is Ordered that this case be and the same is hereby submitted. [274]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof,

in the City and County of San Francisco, on Tuesday, the 9th day of July, in the year of our Lord one thousand nine hundred and forty.

Present: the Honorable Harold Louderback,
District Judge.

No. 21467-L Civil

UNITED STATES OF AMERICA,

vs.

COUNTY OF ALAMEDA, Etc.

This case having been heretofore heard and submitted, it is Ordered that Judgment be entered for the plaintiff upon findings of fact and conclusions of law, together with costs. [275]

[Title of District Court and Cause.]

NOTICE

To Ralph E. Hoyt, Esq.,
District Attorney, Alameda County,
Court House Building,
Oakland, California.

Frank J. Hennessy, Esq.,
United States Attorney,
Post Office Building,
San Francisco, California.

E. J. Foulds, Esq.,
65 Market Street,
San Francisco, California.

You Are Hereby Notified that on July 9th, 1940,
Judge Harold Louderback Ordered that Judgment

be entered in favor of Plaintiff, upon findings of fact and conclusions of law to be filed, together with costs.

WALTER B. MALING,

Clerk. (a)

San Francisco, California, July 10th, 1940. [276]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 21467-L

UNITED STATES OF AMERICA,

Plaintiff,

vs.

COUNTY OF ALAMEDA (a Body Corporate and
Politic, and a Political Subdivision of the State
of California), CENTRAL PACIFIC RAIL-
WAY COMPANY, and SOUTHERN PA-
CIFIC COMPANY,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause heretofore came on duly and regularly for trial and hearing before this Court, sitting without a jury; Messrs. Frank J. Hennessy, United States Attorney, W. E. Licking, Assistant United States Attorney, and Brice Toole,

Attorney, Department of Justice, appearing for the plaintiff, and Messrs. Ralph E. Hoyt, District Attorney, J. F. Coakley, Assistant District Attorney, and Robert H. McCreary, Assistant District Attorney, appearing for the defendant County of Alameda, and Mr. E. J. Foulds, appearing for the defendants Central Pacific Railway Company, and Southern Pacific Company; both oral and documentary evidence having been introduced at the trial thereof, on behalf of the respective parties hereto, and the evidence being closed, and the cause submitted to this Court for its decision and determination, and the Court being duly advised in the premises, finds the following facts: [277]

FINDINGS OF FACTS

I.

The plaintiff is the United States. The County of Alameda was at all times herein mentioned, and now is a body corporate and politic, and a political subdivision of the State of California. The Central Pacific Railway Company, and the Southern Pacific Company are private corporations, duly authorized and licensed to do business within the State of California, and are engaged in the business of operating railroad lines within and without said State and are the owners of, or claim some interest in, certain railway rights of way within the said County of Alameda in or over the Tidal Canal described hereafter, and more particularly in, over

and upon the Fruitvale Avenue Bridge hereinafter mentioned.

II.

The City of Alameda and the City of Oakland are both situated upon the east shore of San Francisco Bay, a navigable body of water. Both said cities are located within Alameda County, State of California, and are separated from each other by a navigable body of water known at various times and in various quarters by the following names: San Antonio Estuary, Oakland Estuary, Oakland Harbor, Inner Harbor and Tidal Canal and Alameda Estuary. Said body of water is roughly seven miles in length, extending in a general east and west direction from San Leandro Bay, an arm of San Francisco Bay, on the east, to another point in San Francisco Bay proper at the end of the moles of the Southern Pacific Railroad Company and the Western Pacific Railroad Company on the west. Said Estuary constitutes [278] what is commonly known as Oakland's inner harbor; the outer harbor extending in a northeasterly direction for about two miles from the entrance to the inner harbor. The westerly end of the Estuary, for a distance of about two miles, is an entrance channel, protected by stone retaining walls on either side. Said entrance channel varies from Seven Hundred and Fifty to Eight Hundred and Fifty feet in width. Immediately east of said entrance channel lies the main portion of the inner harbor, with docking facilities; the width of the channel here being Six Hundred feet, and the nat-

ural harbor varying from Six Hundred and Fifty feet at the narrowest points to about Three Thousand Five Hundred Feet at the easterly end where the harbor widens to form what is known as Brooklyn Basin.

Easterly of Brooklyn Basin and forming a continuous part of the same body of water is the "Tidal Canal" nearly two miles in length connecting the inner harbor with San Leandro Bay. Said Tidal Canal was originally dredged by the United States to turn the water from San Leandro Bay or estuary through a tidal canal into the head of San Antonio estuary, so as to increase the tidal flow into and through said San Antonio estuary, for the purpose of removing the sediment from the same.

III.

In the year 1874 Congress enacted the Rivers and Harbors Act for that year, in which the sum of \$100,000 was appropriated "for the improvement of Oakland harbor;" (18 Stat. 237, c. 457) to be expended under the direction of the Secretary of War.

In 1876 the United States instituted a condemnation proceeding in the District Court of the Third Judicial District in and for [279] the State of California (now the Superior Court of the State of California, in and for the County of Alameda) to acquire a right of way for the said Tidal Canal, said action being entitled *The United States, plaintiff, v. Crooks, County of Alameda, Central Pacific Railroad Company, et al, defendants, action No.*

3590 in the records of the County Clerk of the County of Alameda for the District Court of the Third Judicial District, the State of California, in and for the County of Alameda.

IV.

In said suit the County of Alameda and the Central Pacific Railroad Company were named, among others, as defendants and the United States sought to condemn the rights of the County and of the railroad in certain highways and railroad rights of way which crossed the proposed Tidal Canal at the places where the Fruitvale Avenue, High and Park Street bridges are now located, and at Washington Avenue, where a railroad right of way was then located. The right of way and tracks of the Central Pacific Railroad Company, which crossed the proposed Tidal Canal at Fruitvale Avenue, paralleled and adjoined the right of way of the county road belonging to the defendant, County of Alameda, which also crossed the proposed Tidal Canal at Fruitvale Avenue.

The County of Alameda and the railroad company asked for no damages in said condemnation proceedings, and in the decree in said action hereinabove referred to, it was provided, among other things:

“Defendants, the County of Alameda, The Central Pacific Railroad Company, Charles Heinecke and S. A. Smith, not having claimed damages, no damages are awarded to them.

“It is further ordered, adjudged and decreed that in the construction of said canal the plaintiff at its own expense construct and keep in repair suitable bridges across the same on all the roads now used as public highways crossing the line of said canal and also suitable railroad bridges on the present railroad tracks crossing the lines of said canal.”

V.

After said decree of condemnation, the United States constructed said Tidal Canal and constructed, and until November 17, 1913, maintained and operated highway drawbridges at Park Street and High Street, and a combination railroad, vehicular and pedestrian drawbridge at Fruitvale Avenue. The Park Street Bridge was completed in 1891; the High Street and Fruitvale Avenue Bridges were completed in 1901 and said construction of said Tidal Canal was completed in 1903.

The bridges were constructed as drawbridges of the swing type, turning or pivoting horizontally upon central piers, and were equipped with hand-operated machinery. It took approximately thirty minutes to open and thirty minutes to close each of these bridges. After these bridges were equipped with electrical operating machinery, as hereinafter set forth, it took from two to three minutes to open, and the same time to close each of said bridges.

Prior to said installation of electrical operating machinery the United States did not regularly

operate said bridges, but did, on occasions, open and close them on request of private interests for the passage of vessels; private interests on occasions also opened and closed said bridges on their own responsibility for the passage of vessels which could not clear said bridges when closed; [281] and boats, barges and scows which could clear said bridges when closed plied up and down said Tidal Canal. The Tidal Canal was not open to navigation.

VI.

Prior to the institution of said condemnation proceedings the Central Pacific Railroad Company (predecessor of defendant Central Pacific Railway Company) was the owner of two lines of railroad extending across the lands sought to be condemned. One line of said railroad was on or adjoining Fruitvale Avenue, and the other line was on or adjoining Washington Avenue, across the site of the proposed Tidal Canal, in said Alameda County, and the said Central Pacific Railroad Company was the owner of rights of way in said two lines of railroad, and was a party defendant in said condemnation proceedings.

VII.

On March 7, 1901, an agreement in writing was entered into between the United States, Central Pacific Railway Company (said Central Pacific Railway Company having succeeded to the interest of said Central Pacific Railroad Company) and the Southern Pacific Company (lessee of Central Pa-

cific Railway Company), under which agreement the Central Pacific Railway Company in consideration of \$50,000 agreed to abandon its line of railroad on or adjoining Washington Avenue, and to relieve the United States of any obligation to construct or maintain a drawbridge across said Tidal Canal [282] at Washington Avenue. The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in *United States v. Crooks et al.*

VIII.

On December 6, 1909, the Board of Supervisors of Alameda County adopted a Resolution as follows:

“RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA, STATE OF CALIFORNIA, ACCEPTING PARK STREET, FRUITVALE AVENUE AND HIGH STREET BRIDGES.

“Whereas, there exists in the County of Alameda, State of California, over and across the United States Tidal Canal, certain draw bridges commonly known as the Park Street Bridge and Fruitvale Avenue Bridge, and the High Street Bridge, all of which bridges were constructed over said canal by, and belong to, and are the property of, the United States of America; and

Whereas, no provision has ever been made for the operation of said bridges by the United States Government; and

Whereas, that portion of said canal between said bridges has never been open to navigation; and

Whereas, the requirements of commerce and shipping would be materially benefited by the operation of said bridges, and the opening of said canal to navigation in such manner as to permit the passage of vessels in said canal; and

Whereas, Lieutenant Colonel John Biddle, U. S. A., in his report upon the improvement of rivers and harbors in the First San Francisco, California Districts, has recommended that the bridges hereinbefore referred to, to-wit, the High Street Bridge, Fruitvale Avenue Bridge and the Park Street Bridge be turned over to the County of Alameda, provided that the County of Alameda thereafter assume all cost of repair, operation and replacement when necessary; and

Whereas, the Honorable Joseph R. Knowland, Congressman from the Third District of California, has succeeded in securing the recommendation of the War Department that permission be given to turn these bridges over to the County of Alameda; and [283]

Whereas, the City of Alameda, acting by and through its regularly constituted authorities thereunto duly authorized, has agreed to supply electric power for the operation of said bridges

hereinabove referred to for the period of five years, without cost to the said County of Alameda, now, therefore,

Be It Resolved that the County of Alameda, by and through its Board of Supervisors thereunto duly authorized, hereby agrees to accept said bridges, to-wit: The said Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge and to assume all costs of future repair, operation and replacement of said bridges, provided that they and each of them be placed in such condition and repair by the United States of America, prior to such acceptance by the said County of Alameda, in the State of California, that said bridges, and each of them may be operated by electricity, and provided further that the United States shall, under such terms and conditions as it may see fit, lease the waterfront of the tidal canal and establish harbor lines so as to permit the construction of wharves and docks; and

Be It Further Resolved that a copy of this resolution be sent by this Board under seal of this Board to United States Senator George C. Perkins, Congressman Joseph R. Knowland, Lieutenant Colonel John Biddle, and to the City Clerk of the City of Alameda.

Passed and adopted by the following vote:

Ayes: Supervisors Bridge, Foss, Mullins and Ch. Honrner 4.

Noes: Supervisors None.

Absent: Supervisors Kelley.

I hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the Board of Supervisors of Alameda, Cal., Monday, December 6th, 1909.

JOHN P. COOK,

County Clerk and Ex-officio
Clerk of the Board of Super-
visors of Alameda County,
Cal.

By H. M. WILSON,

Deputy Clerk." [284]

IX.

On September 3, 1910, the Secretary of War issued a license to the County of Alameda as follows:

"J. A. G. O.

(27215)

"Whereas, By the Act of Congress approved June 25, 1910, entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes' (Public—No. 264), and under the clause of appropriation therein for 'Improving harbor at Oakland, California', it is provided, inter alia, as follows:

'Provided further, that the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of

the Secretary of War may be equitable and **just to the United States** and to said local authorities; Provided further, that of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer’;

Now, Therefore, under the authority and discretion in him vested by the above-quoted provision of said Act of Congress, and in accordance with the recommendation of the Chief of Engineers, United States Army, the Secretary of War hereby grants unto the Board of Supervisors of Alameda County, California, a License, revocable at will by the Secretary of War, to assume control of the said three (3) bridges built by the United States in connection with the improvement of Oakland Harbor, California.

This License is granted subject to the following conditions and provisions:

1.—That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or coporations shall desire to use the bridges, or any one of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2.—That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3.—That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions.

4.—That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5.—That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic.

Witness my hand this 3rd day of September, 1910.

(Signed) JOHN C. SCOFIELD

Assistant and Chief Clerk

For the Secretary of War,
in his absence."

X.

On November 10, 1913, the Board of Supervisors of Alameda County adopted a Resolution as follows:

“RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF ALAMEDA.

Introduced by Supervisor.....

at Meeting Held Nov. 10, 1913.

“Whereas, This Board of Supervisors, by resolution heretofore adopted, agreed to accept certain draw bridges across [286] the United States Tidal Canal in Alameda County, commonly known as the Park Street Bridge, Fruitvale Avenue Bridge and High Street Bridge, and assume all costs of future repair, operation and replacement of said bridges, provided that each of said bridges were placed in such condition and repair by the United States Government that said bridges, and each of them, might be operated by electricity, and that the United States should, under such terms and conditions as it might see fit, lease the water front of the Tidal Canal and establish harbor lines so as to permit the construction of wharves and docks; and

Whereas, subsequent to the adoption of said resolution, and on the 3rd day of September, 1910, the Secretary of War, in accordance with the provisions of an Act of Congress, approved

June 25, 1910, entitled 'An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes' (public No. 264), issued a license to the Board of Supervisors, revocable at will by the Secretary of War, to assume control of the said three bridges built by the United States in connection with the improvement of Oakland Harbor, California, which said license was granted subject to the following conditions and provisions, to-wit:

1. That the three bridges shall be freely open to all public traffic without charge, and that no exclusive privilege or right-of-way shall be granted to any street car or other traffic corporation, and in case two or more such lines or corporations shall desire to use the bridges, or any of them, each shall pay its proportional share of the original cost and its share of maintenance of the track or tracks jointly used.

2. That for the purpose of securing a compliance with the terms of this permit, the said three bridges shall be under the supervision of the Engineer Officer of the United States Army in charge of the Engineer District in which the bridges are situated.

3. That the United States shall put all three bridges in condition for operation of their draws by electrical power, furnishing and installing new electrical power, furnish-

ing and installing new electrical machinery together with the necessary cables and wiring; furnishing bridge-tenders' houses and highway gates; and also overhauling all old machinery and putting it in good order for operation under the new conditions. [287]

4. That said Board of Supervisors shall maintain these bridges, attending to all necessary repairs, and rebuilding same if at any time burned, destroyed, or become inadequate for the purpose they serve.

5. That said Board of Supervisors shall maintain the necessary number of bridge-tenders at each bridge to insure their draws being promptly opened and closed as required in the interests of navigation and street traffic; and

Whereas, the United States has put all three bridges in condition for operation of their draws by electrical power, has furnished and installed new electrical machinery, together with the necessary cables and wiring, furnished bridge-tenders' houses and highway gates; and, also, overhauled all old machinery and put it in good order for operation, under the new conditions as required by paragraph 3 of said License, and has performed all things required by it to be performed, under the terms of said License; now, therefore,

Be It Resolved that the Board of Supervisors of Alameda County, California, does hereby accept and assume control of the said three bridges heretofore built by the United States in connection with the improvement of Oakland Harbor, to-wit, the Park Street Bridge, the Fruitvale Avenue Bridge and the High Street Bridge, subject to the conditions and provisions of the aforesaid License of September 3, 1910, said acceptance being effective from and after Monday, November 17th, 1913.

Adopted by the following vote:

Ayes: Supervisors Bridge, Foss, Kelley, Murphy and Chairman Mullins—5.

Noes: Supervisors None.

Absent: Supervisors None.

I, John P. Cook, County Clerk, and ex-officio Clerk of the Board of Supervisors of Alameda County, State of California, do hereby certify that the foregoing resolution hereunto attached is a true and correct copy of a resolution adopted by said Board of Supervisors of Alameda County, State of California, on Monday, November 10, A. D. 1913.

JOHN P. COOK,

County Clerk and ex-Officio
Clerk of the Board of Super-
visors of Alameda County,
State of California.

By H. M. WILSON,

Deputy Clerk." [288]

XI.

On June 3, 1913, the United States opened the Tidal Canal to navigation, established harbor lines, and made available to adjacent property owners, a twenty-five foot strip of property along each side of the Canal for the construction of wharves and warehouses.

XII.

Thereafter the said bridges were operated, repaired and maintained at the expense of said County and have been so repaired, maintained and operated except that the bridges at Park Street and High Street have been reconstructed and are now operated, repaired and maintained under other arrangements between the United States and said County which are of no significance to the present case.

XIII.

The total cost to the United States for the repair and electrification of said Fruitvale Avenue, High Street and Park Street Bridges was \$21,358.80.

The annual cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge commencing during the fiscal year 1913-1914 to and including the fiscal year 1938-39 is hereinafter set forth. The annual costs paid by the County of Alameda for maintaining and operating the High Street and Park Street Bridges commencing during the fiscal year 1913-14 to the respective fiscal year of commencement of reconstruction of the High Street and Park Street Bridges are also set forth as follows: [289]

Fiscal Year	Fruitvale Avenue Bridge	High Street Bridge	Park Street Bridge
1913-14	\$ 1,937.84	\$ 1,875.48	\$ 2,891.21
1914-15	11,842.51	14,146.76	9,684.14
1915-16	3,078.39	2,344.54	4,078.73
1916-17	4,072.45	3,953.74	2,840.85
1917-18	5,075.85	2,826.06	6,224.64
1918-19	6,949.80	6,652.10	10,153.72
1919-20	7,812.75	9,769.53	10,357.54
1920-21	18,465.73	6,103.83	9,167.29
1921-22	6,671.50	6,884.75	13,644.52
1922-23	7,215.71	6,796.90	13,503.47
1923-24	6,331.12	14,406.92	8,048.20
1924-25	7,558.69	9,940.27	7,466.12
1925-26	10,037.87	6,832.69	9,972.74
1926-27	8,322.69	7,485.69	7,856.16
1927-28	7,751.94	9,690.75	13,502.22
1928-29	9,888.50	10,965.56	21,003.10
1929-30	12,797.87	22,319.42	10,116.56
1930-31	29,738.53	13,150.53	12,766.64
1931-32	13,840.17	11,472.59	15,079.37
1932-33	10,130.60	9,668.81	11,888.35
1933-34	11,598.59	14,379.24	
1934-35	13,168.07	11,193.94	
1935-36	11,332.04	11,193.42	
1936-37	12,005.73	11,923.38	
1937-38	12,663.73	14,695.79	
1938-39	12,059.32		
Total.....	\$262,148.19	\$240,672.69	\$200,245.57

[290]

The total cost paid by the County of Alameda for maintaining and operating said Bridges for the periods of time hereinabove set forth was \$703,066.45.

Subsequent to the end of the fiscal year 1938-39 the average cost paid by the County of Alameda for maintaining and operating the Fruitvale Avenue Bridge has been approximately One Thousand Dollars (\$1,000.00) per month, and the cost of re-

placing this Bridge is estimated to be approximately One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00).

The total cost of maintaining, operating or replacing said Bridges since November 17, 1913, has exceeded the income and revenues provided for the fiscal year 1913-14, or any fiscal year prior thereto, and the expenditure was not assented to by two-thirds of the qualified electors of the County of Alameda voting at an election held for that purpose.

In the fiscal year 1913-14, and in each fiscal year thereafter, the income and revenue provided by the County of Alameda for each such fiscal year was sufficient to pay for the maintenance and operation of said Fruitvale Avenue Bridge for each such one (1) fiscal year.

In the fiscal year 1913-14, and in each fiscal year thereafter, prior to the respective fiscal year of the commencement of the reconstruction of the High Street and Park Street Bridges, the income and revenue provided by the County of Alameda for each such fiscal year was also sufficient to pay for the maintenance and operation of said High Street and Park Street Bridges for each such one (1) fiscal year. [291]

XIV.

The Fruitvale Avenue Bridge is a combination railroad, vehicular and pedestrian swing span draw-bridge, built upon a single concrete center pier, and has been operated and repaired since November 17, 1913, at the expense of the County of Alameda.

The tracks and right of way of the Central Pacific Railway Company and its lessee the Southern Pacific Company are and were at all times permanent, integral and inseparable parts of the Fruitvale Avenue Bridge as constructed, and said tracks and right of way are, and since the said construction were used by the Central Pacific Railway Company and its lessee the Southern Pacific Company for the transit of both freight and interurban passenger trains over said Fruitvale Avenue Bridge. Both the Central Pacific Railway Company and the Southern Pacific Company are and were at all times private corporations. The Central Pacific Railroad Company was at all times a private corporation.

XV.

The City of Oakland is on the mainland side of San Francisco Bay. Said city is, and prior to 1909, was, the terminal of all transcontinental railroads in central and northern California. Subsequent to the construction of the Park Street, High Street and Fruitvale Avenue Bridges, the population of the cities of Oakland and Alameda increased steadily and substantially as hereinafter set forth. Industry, shipping and commerce, both interstate and with foreign countries, as well as intrastate, increased proportionately in said cities. Traffic connected with said intrastate, [292] interstate and foreign commerce likewise increased upon the waters described, including the waters of the Tidal Canal. Traffic upon the three bridges spanning said Tidal Canal also increased.

The Fruitvale Avenue Bridge connects residential and industrial sections of the City of Alameda with similar sections of the City of Oakland via Fruitvale Avenue, which Avenue is also a principal thoroughfare cutting through all the main traffic arteries between the Tidal Canal and the countryside. The Fruitvale Avenue Bridge carries the only rail connection both freight and interurban passenger traffic between the mainland and the City of Alameda, which is entirely surrounded by water.

The population of the County of Alameda according to the official census of the United States from 1890 to 1930, both years inclusive, is as follows:

Year	Population
1890	93,864
1900	130,197
1910	246,131
1920	344,177
1930	474,883

The respective populations of the City of Alameda and the City of Oakland, which two cities are separated by the Tidal Canal, according to the official census of the United States from 1880 to 1930, both years inclusive, is as follows: [293]

City of Alameda

Year	Population
1880	5,708
1890	11,165
1900	16,464
1910	23,383
1920	28,806
1930	35,033

City of Oakland

Year	Population
1880	34,555
1890	48,682
1900	66,960
1910	150,174
1920	216,261
1930	284,063

XVI.

On September 28, 1939, the said County notified the United States that on December 31, 1939, it would cease to operate said Fruitvale Avenue Bridge and referred to the decision of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460.

XVII.

Thereafter, on July 27, 1939, the Central Pacific Railway Company and the Southern Pacific Company served notice upon the plaintiff herein requesting that the plaintiff comply with the Decree in the case of [294] *United States v. Crooks*, and others, and cause the Fruitvale Avenue Bridge to be inspected, maintained and renewed.

XVIII.

The decision of *County of Alameda v. Ross*, 32 Cal. App. (2d) 135, 89 Pac. (2d) 460, held the license agreement to be void. The "Petition for Writ of Mandate" before the Court in that case was filed originally in the Supreme Court of the State of California on November 25, 1938. On November 28,

1938, said Supreme Court of the State of California transferred the case to the District Court of Appeal of the Third Appellate District of the State of California for hearing and determination. The decision was duly entered on April 12, 1939. On May 19, 1939, a Petition to the Supreme Court of the State of California for hearing after said decision was filed in said Supreme Court. Said application to have the cause heard in the Supreme Court after said judgment was denied by the Supreme Court on June 1, 1939. The Court, in the said case of *County of Alameda v. Ross*, supra, did not have before it the resolution of the Board of Supervisors of the County of Alameda of December 6, 1909.

CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts the Court finds:

I.

That the County of Alameda and the United States entered into a valid, binding contract, as evidenced by the Resolution adopted by the Board of Supervisors of said [295] County on December 6, 1909; by the License issued by the Secretary of War on September 3, 1910; and the Resolution adopted by the Board of Supervisors of said County on November 10, 1913.

II.

That under said contract the said County of Alameda is obligated to maintain, operate, repair, or rebuild said Fruitvale Avenue bridge.

III.

That the defendants Central Pacific Railway Company, and Southern Pacific Company were and are not parties to said contract between the said County of Alameda and the United States.

IV.

That the counter claim of the defendant County of Alameda be dismissed and said defendant County take nothing thereby.

United States District Judge

[Endorsed]: Lodged July 16, 1940. [296]

[Title of District Court and Cause.]

DEFENDANT COUNTY OF ALAMEDA'S PRO-
POSED AMENDMENTS AND ADDITIONS
TO FINDINGS OF FACT AND CONCLU-
SIONS OF LAW.

Now comes the Defendant County of Alameda and proposes the following amendments and additions to Plaintiff's "Findings of Fact and Conclusions of Law":

1. Page 1, line 6, after the word "Coakley", insert Chief.
2. Page 1, line 8, before the word "appearing" insert Cecil Mosbacher, Deputy District Attorney.

FINDINGS OF FACTS

1. Paragraph II, to the last line of this Paragraph at page 3 after the words . . . “for the purpose of removing the sedi- [297] ment from the same” add the following: and affording a deeper entrance to said San Leandro Bay through San Antonio Estuary and the Canal, all in the interest of commerce and navigation on the east side of San Francisco Bay.

2. Paragraph V, line 2, after the words “said Tidal Canal” insert: to a depth averaging in soundings from 8 to 10 feet, said soundings referring to the plane of mean lower low water, as per “Exhibit 2” page 91 of the “Agreed Statement of Facts” on file herein.

3. Paragraph V, line 5, after the words “at Fruitvale Avenue” insert: the latter with a clearance below such bridge of 12 feet 8 inches above mean lower low water as per “Exhibit 2” page 91 of the “Agreed Statement of Facts” on file herein.

4. Paragraph V, delete the last sentence of this Paragraph, at page 6, “The Tidal Canal was not open to navigation” and substitute: The Tidal Canal was navigable in fact.

5. Paragraph VII, at page 7, line 1, after the words “at Washington Avenue” insert: Said Agreement read as follows:

“A.

“This Agreement, made and entered into this Seventh (7th) day of March A. D. 1901, between the United States of America the Cen-

tral Pacific Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and the Southern Pacific Company, a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky.

“Witnesseth: That whereas, the United States of America, as plaintiff, did on the fourth day of March 1876, commence proceedings in the Third District Court of the State of California, in the County of Alameda, against the Central Pacific Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and other defendants, for the condemnation of certain lands and rights owned and claimed [298] by said defendants and required by said plaintiff for the construction of a Tidal Canal, authorized by certain Acts of Congress making appropriations for the improvement of Oakland Harbor.

“And Whereas, on the fourth day of November, 1882, in the Superior Court of the County of Alameda, State of California, jurisdiction having been conferred thereon, a certain decree was filed in said cause condemning the lands and rights of said defendants, and especially condemning the lands and rights of the said Central Pacific Railroad Company for the uses and purposes for which the same were sought, and which is more especially set out in the complaint therein and in said decree.

“And Whereas, in said decree it was determined and adjudged as a condition to be kept and performed by the United States of America, that in the construction of said canal, the said United States should, at its own expense, construct and keep in repair for the said Central Pacific Railroad Company, certain railroad bridges across the same, along the line of the present railroad crossing the said proposed canal that is to say, one along the line of said railroad on or adjoining Fruitvale Avenue, and one along the line of said railroad on or adjoining Washington Avenue, which said last mentioned line is shown colored red on the annexed map and made part hereof.

“And Whereas, the said Central Pacific Railway Company is the successor in interest of the said Central Pacific Railroad Company, and as such has succeeded to all the rights and privileges in and by virtue of said decree of Court,

“And Whereas, The Southern Pacific Company, as the lessee, has or claims some interest in the decree aforesaid.

“And Whereas, the abandonment of one of said bridges, to wit, the one on the line of said railroad on or adjoining Washington Avenue would be in the interest of commerce and navigation, and would relieve the said United States of great expense in constructing and keeping the same in repair.

“Now Therefore, in consideration of the

premises, and the sum of Fifty thousand (\$50,000) dollars paid by the United States to the Central Pacific Railway Company, the receipt whereof is hereby acknowledged, the Central Pacific Railway Company and the Southern Pacific Company do hereby release, absolve and discharge, now and forever, both in law and in equity the said United States from the performance of the obligation and condition to construct the bridge along the said line of railroad on or near Washington Avenue, and the United States is hereby released, absolved and discharged, now and forever, both in law and in equity, from the performance of the obligation and condition to construct the said proposed [299] bridge along the said line of railroad on or near Washington Avenue, and accepts this agreement and payment as a full performance of said decree in reference to said last named bridge.

“In Witness Whereof, the parties hereto, the United States by W. H. Heuer, Lieutenant Colonel, Corps of Engineers, U. S. A., duly authorized by law and the Secretary of War, the Central Pacific Railway Company by its President and Secretary, duly authorized by resolution of its Board of Directors passed on the Thirty First day of January 1901, and the Southern Pacific Company by its President and Secretary, duly authorized by resolution of its Board of Directors passed on the 7th day of

March 1901, have hereunto set their hands and seals the day and year first above written.

“Signed, sealed and delivered in presence of
G. KNIGHT WHITY.

[Signet]

[Seal]

W. H. HEUER,

Lieutenant Colonel, Corps of
Engineers, U.S. A.

CENTRAL PACIFIC RAIL-
WAY COMPANY

By ISAAC L. REQUA,

President

J. L. WILLCUTT,

Secretary.

SOUTHERN PACIFIC
COMPANY

By CHARLES M. HAYS,

President

I. E. GATES,

Secretary.”

(Copies of resolutions and acknowledgements
attached.)”

6. Paragraph VII, delete the last sentence of this Paragraph, at page 7, “The defendant railroad companies claim no right or title in the Fruitvale Avenue bridge except those rights conferred upon them, or their predecessors, by the decree in United [300] States v. Crooks et al.” and substitute the following: The defendant railroad companies claim a right to have the Fruitvale Avenue Bridge oper-

ated, maintained, repaired and whenever necessary, replaced by the plaintiff under the decree in *United States v. Crooks, et al.*

7. Paragraph VIII, at page 8, add thereafter the following new paragraph:

“VIII-A

“In the Rivers and Harbors Act, approved June 25, 1910, 36 Stat. 630, c. 382, it is provided, *inter alia*, as follows:

‘Provided further, That the three bridges heretofore built by the United States in connection with this improvement may be turned over to the local authorities to be maintained and operated by them upon such terms as to transfer and control as in the discretion of the Secretary of War may be equitable and just to the United States and to said local authorities; Provided further, That of the appropriation herein made so much as shall be necessary may be expended for such alterations and repairs to said bridges as in the discretion of the Secretary of War may be essential to meet the terms of said transfer.’ ”

7-a. Paragraph X condition 3, lines 3 and 4 delete the following words: “furnishing and installing new electrical power”.

8. Strike all of Paragraph XI and substitute the following:

“XI.

“Between September 3, 1910, and November 10, 1913, the plaintiff installed electrical operating ma-

chinery on the said bridges and thereafter the bridges were operated, maintained and repaired by the County of Alameda instead of the plaintiff.

“In 1910 a harbor line survey was made for San Francisco Bay for the purpose of establishing harbor lines in said area pursuant to recommendation of the Board of Engineers of the United States Army and authorization of Congress previously made. [301]

“In the making of said survey a survey made prior to 1876 for the purpose of the condemnation action of *United States v. Crooks, et al* was used in the preparation of the map of harbor lines of the Tidal Canal and San Leandro Point Area as shown on Map, or Sheet, No. 5 (Plaintiff’s Exhibit 12).

“The endorsement on the “Maps of San Francisco Bay, Cal., showing Harbor Lines Prepared by the San Francisco Harbor Line Board 1912”, including Plaintiff’s Exhibit 12, read as follows:

‘War Department

“Washington, Jany. 20 1913.

“The harbor lines shown and described on the accompanying maps, viz: San Francisco Nos. 1, 2 & 3, and San Francisco Bay Nos. 1 to 7 inclus. are approved to supersede all harbor lines, previously approved for the localities shown thereon.

ROBERT SHAW OLIVER

Asst. Secretary of War.’

“The harbor lines thus approved were revocable at will by the Secretary of War and were in fact revoked in 1929 by the Secretary of War, at which time they were changed by moving the pierhead lines back to the bulkhead lines so that thereafter said lines were coterminous with the property lines of the property adjoining the Tidal Canal.

“The area between pierhead and bulkhead lines as shown on Plaintiff’s Exhibit 10 was made available for use by adjoining property owners at the pleasure of the plaintiff and without special lease of any kind as shown by the endorsement on the title sheet of Plaintiff’s Exhibit 9 reading as follows:

‘War Department.

‘Washington, June 3, 1913

‘The owners of property abutting the lands included in the right of way acquired by the United States for the Oakland Tidal Canal shown on accompanying Sheet No. 5 are hereby authorized and permitted to occupy, with open-work non-permanent structures for wharf purposes, the portions of the strip of U. S. property fronting their respective properties and situated between the pierhead and bulkhead lines [302] approved Jan. 20, 1913, without special lease or charges of any kind, it being expressly understood that this permission is revocable at any time when this area may be again required for purposes of navigation and

shall not be construed as a relinquishment of the Government title to the said right of way.

HENRY BRECKINRIDGE

Asst. Secretary of War.' ”

9. Paragraph XVI, add to the end thereof the following:—Said County subsequently agreed to operate said Bridge until March 31, 1940, but in so doing it was agreed that said County waived no rights, expressly retained all rights it might have in the premises, and that the position of the County of Alameda in this suit was not to be prejudiced in any way by such operation. It was further agreed that should said County subsequently agree to operate said Bridge after March 31, 1940, or should said County in any manner continue to operate said Bridge, that said County would thereby waive no rights, but would expressly retain all rights it might have in the premises, and that the position of the County of Alameda in this suit would not be prejudiced in any way by such operation or by such extension or extensions of time—.

10. Paragraph XVIII, to the last line after the words . . . “December 6, 1909” add the following:—but said resolution was incorporated in the resolution of the Board of Supervisors of the County of Alameda of November 10, 1913, which latter resolution was before said Court. The United States was notified by the District Attorney of the County of Alameda, as counsel for the County of Alameda, of the filing of said “Petition for Writ of Mandate” in said action. Copies of all papers filed in said action by both petitioner and respondent, including the

stipulation of facts and all briefs, were sent to and received by the United States Attorney [303] in San Francisco during the proceedings and before the case was submitted—.

CONCLUSIONS OF LAW

1. Paragraph II, line 2, after the word “or” insert:—when necessary—.

2. Paragraph III, line 2, delete “not parties” and substitute:—third party beneficiaries—.

3. Strike all of Paragraph IV and substitute the following:

“IV

“That prior to 1909 the Tidal Canal was a navigable waterway.”

Respectfully submitted,

RALPH E. HOYT

District Attorney in and for the
County of Alameda, State of
California.

J. F. COAKLEY

Chief Assistant District Attorney
in and for the County of
Alameda, State of California.

ROBERT H. McCREARY

Assistant District Attorney in
and for the County of Alameda,
State of California.

CECIL MOSBACHER

Deputy District Attorney in and
for the County of Alameda,
State of California.

Attorneys for Defendant, County
of Alameda.